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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-598

THE GREYHOUND CORPORATION AND GREYHOUND LINES, INC.,
Petitioners,

vs.

MT. HOOD STAGES, INC.,
doing business as PACIFIC TRAILWAYS,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioners, The Greyhound Corporation and Greyhound Lines, Inc. ("Greyhound"), respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 9, 1977. That judgment and opinion affirmed a $14,400,000 judgment in favor of Respondent Mt. Hood Stages dba Pacific Trailways ("Mt. Hood") entered by the United States District Court for the District of Oregon.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 555 F.2d 687; a copy is attached hereto as Appendix A. The Court of Appeals' order denying Greyhound's Petition for Rehearing with Suggestion for Rehearing *en Banc* is unreported; a copy is attached

as Appendix B. There is no reported decision of the District Court. Copies of its memoranda and orders denying Greyhound's post-trial motions and concerning attorneys' fees are attached as Appendix C and Appendix D, respectively.

JURISDICTION

The Court of Appeals' judgment was entered on June 9, 1977. A timely Petition for Rehearing with Suggestion for Rehearing *en Banc* was denied on August 3, 1977. (App. B) This Petition is being filed within 90 days of that date. This Court has jurisdiction to review the judgment in question by writ of certiorari under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. This action involves a private antitrust attack on Greyhound's acquisition of bus companies and on the manner in which Greyhound operated the acquired companies. The acquisitions were approved by the Interstate Commerce Commission ("ICC") as being in the public interest under Section 5(2) of the Interstate Commerce Act, and the manner of Greyhound's subsequent operation of the acquired companies was subject to comprehensive ICC regulation. Paragraph (12) of Section 5 of the Interstate Commerce Act provides that:

> "The authority conferred by this section shall be exclusive and plenary . . . any carrier . . . participating in . . . any transaction approved . . . shall be and they are relieved from the operation of the antitrust laws . . . insofar as may be necessary to enable them to carry into effect the transaction . . . and to hold, maintain, and operate any properties and exercise any control . . . acquired . . . ." 49 U.S.C. § 5(12).

Do Section 5(12) and applicable principles of antitrust law permit a treble damage award of $14,400,000 to be based upon a jury's application of antitrust standards to acquisitions approved

by the ICC and to the manner of operation of the acquired companies which is subject to the ICC's "exclusive and plenary" regulatory authority under the Interstate Commerce Act?

2. In 1947 and 1957 Greyhound entered into consent decrees with the Justice Department. Those decrees expressly negate any admission that Greyhound violated the antitrust laws, and they were entered before any testimony was taken. The Court of Appeals affirmed the District Court's admission of those decrees into evidence on the ultimate issues under the Sherman Act. Section 5(a) of the Clayton Act provides that:

> "A final judgment or decree . . . in any civil or criminal proceeding brought by . . . the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party . . . : *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken . . . ." 15 U.S.C. § 16(a).

One purpose of that statute is to encourage the use of consent decrees which are crucial to the Justice Department's antitrust enforcement program.

Does Section 5(a) of the Clayton Act permit a jury to base a finding of violation of the Sherman Act on consent decrees which expressly deny any antitrust violation and which were entered before any testimony was taken?

3. On October 7, 1964, Mt. Hood petitioned the ICC to reopen certain ICC proceedings involving Greyhound's acquisition of several bus companies. On December 14, 1964, the United States filed a petition for leave to intervene in the ICC proceedings. Its petition made no charges and sought no relief. The Court of Appeals held the filing of that petition tolled the statute of limitations from the date it was filed and before it was granted. The Clayton Act, 15 U.S.C. § 16(i), provides that:

> "Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws . . . the running of the statute of limitations in respect of every private . . . right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended . . . ." 15 U.S.C. § 16(i).

The Department of Justice participates and expresses its views in a wide variety and a large number of administrative proceedings.

Does Section 16(i) toll the statute of limitations every time the Department of Justice files a petition for leave to intervene in an administrative proceeding instituted by another even though the petition complains of nothing and seeks no relief?

4. This action was commenced twenty-five years after Mt. Hood's cause of action accrued. It was based upon conduct that Mt. Hood knew and continuously complained about during the entire twenty-five years. Section 4B of the Clayton Act provides that:

> "Any action to enforce any cause of action under sections 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued." 15 U.S.C. § 15b.

Is Section 4B tolled by fraudulent concealment? If so, did the Court of Appeals properly hold that the statute was tolled for alleged fraudulent concealment because Greyhound had denied it did what Mt. Hood kept complaining it had done?

STATUTES INVOLVED

The statutes involved are 15 U.S.C. §§ 15b, 16(a), 16(i) and 49 U.S.C. § 5. Pertinent portions are quoted in connection with the questions presented. They are set out verbatim in Appendix E.

STATEMENT OF THE CASE

This is a private antitrust action brought by Mt. Hood against Greyhound in the District Court for the District of Oregon under Section 4 of the Clayton Act, 15 U.S.C. § 15.

Mt. Hood and Greyhound Lines, Inc., are motor common carriers of passengers and express, operating under authority from and regulation by the ICC. Mt. Hood's principal routes run between Portland, Eugene and Albany, Oregon, in the West and Salt Lake City, Utah, in the East, and between Klamath Falls, Oregon, in the South and Biggs and The Dalles, Oregon in the North.[1]

Greyhound Lines, Inc., is wholly owned by The Greyhound Corporation, a diversified holding company. *See California Parlor Car Tours Co.*, 93 M.C.C. 392 (1963). (R. 1937-1939) Greyhound Lines has routes serving Portland, Eugene, Salt Lake City, Klamath Falls, Biggs and The Dalles over which it competes with Mt. Hood. Between 1947 and 1954, Greyhound acquired ownership and control of eight bus lines in the western United States, every time with ICC approval. The lines became part of Greyhound's integrated nationwide system of intercity bus transportation which the ICC fostered. *See Greyhound Corp.*, 1 M.C.C. 77, 80-81 (1936); *Greyhound Mergers*, 1 M.C.C. 342, 346-347 (1936); C. Fulda, *Competition in the Regulated Industries, Transportation*, § 5.36 (1961).

Mt. Hood formally protested five of the acquisitions, contending that Greyhound refused to turn passengers over to Mt. Hood that it could handle itself, that the acquisitions would deprive it of connections and would impair the competitive situation and that

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1. Since 1943, Mt. Hood has done business as "Pacific Trailways" and has been a member of the National Trailways Bus System which consists of some 50 bus companies associated together for the purpose of competing with Greyhound. Mt. Hood connects with Trailways companies at Portland, Salt Lake City, Albany and Eugene and features through service over their lines. (Tr. 3845-3849, 3912-3913, Ex. K-13; *Transcontinental Bus System, Inc.*, 59 M.C.C. 233, 235 (1953); *National Trailways Bus System*, 75 M.C.C. 179, 182 (1958))

Greyhound would have the power to extinguish it. (*See* Tr. 3500-3505, 3509-3511, 3513-3515) Notwithstanding these protests, the ICC approved the acquisitions, holding that they would benefit Greyhound and the public by producing economies, coordination and improvement of service, and that "[e]ven if some restraint of competition should result, we may approve the transactions if they are otherwise consistent with the public interest . . . ." *The Greyhound Corp.*, 50 M.C.C. 123, 140 (1947) (R. 1862);[2] *See also The Greyhound Corp.*, 58 M.C.C. 809 (1952) (R. 1895-1904); *The Greyhound Corp.*, 45 M.C.C. 821 (1947); *The Greyhound Corp.*, 55 M.C.C. 801 (1948); *The Greyhound Corp.*, 55 M.C.C. 321 (1948); *The Greyhound Corp.*, 59 M.C.C. 657, 668-670 (1953); *The Greyhound Corp.*, 60 M.C.C. 643, 650-653 (1954).[3]

After unsuccessfully protesting to the ICC against most of the relevant Greyhound acquisitions, Mt. Hood continued to complain about the manner in which Greyhound was quoting service and routing passengers over the acquired lines. From 1955 on, Mt. Hood repeatedly complained that Greyhound was doing precisely what it complained Greyhound had done in this case: that it had instructed its agents in Oregon not to quote Mt. Hood's service, that it was not routing traffic over Mt. Hood's lines, that these practices violated assurances Greyhound had given to the ICC in the acquisition cases and that Greyhound was violating the antitrust laws. (Exs. 197, 215, 289, 297, 303-A, D-12)

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2. In 1943, Mt. Hood had successfully applied to the ICC for an extension of its own routes from Boise to Salt Lake City, on the ground that it needed to reach Salt Lake City to secure "friendly connections" because Greyhound-affiliated carriers would not route passengers over its lines. (*See* Tr. 3400-3407, 3832-3834, 3836) The ICC granted the authority, acknowledging that Mt. Hood's competitors could not be expected to quote its service and route passengers over its lines. *Mt. Hood Stages, Inc.*, 44 M.C.C. 535, 542-544, 547-550 (1945).

3. The relevant opinions and orders are in the record. Tr. 2197; R. 1844, *et seq.*

Greyhound terminated a joint through bus arrangement with Mt. Hood effective September 8, 1964. Mt. Hood immediately petitioned the ICC under Section 5(10) (formerly 5(9)) of the Interstate Commerce Act, 49 U.S.C. § 5(10), to reopen the acquisition cases. It sought modification of the earlier approval orders, restoration of the joint through bus, enforcement of representations and assurances alleged to have been made by Greyhound in the acquisition cases and relief against alleged destructive competitive practices—again the very practices about which it complained in this case. (R. 1402, 1419) On May 27, 1965, the United States was given permission to intervene in the ICC proceeding. The ICC rendered its decision in 1968, finding that the acquisitions had been approved as consistent with the public interest and that Greyhound had been engaged in destructive competition. The ICC did not revoke or modify its prior approval of any of the acquisitions. The ICC held that the proper remedy was a supplemental order with respect to the joint through service, schedule connections and the quotation of Mt. Hood's service. *Mt. Hood Stages, Inc.*, 104 M.C.C. 449, 450, 462-463 (1968); *aff'd sub nom., Greyhound Lines, Inc. v. United States*, 308 F. Supp. 1033 (N.D. Ill. 1970).[4]

This action commenced on July 5, 1968. It is a monopolization case. It is based on the same acquisitions the ICC approved, and on the same conduct that had been the subject of the ICC's extensive regulatory proceedings. As the Court of Appeals put it:

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4. Greyhound sought review of the ICC order and in February 1970, the United States District Court in Chicago issued an injunction requiring restoration of the through bus, the quoting of Mt. Hood's service by Greyhound agents, publication of Mt. Hood schedules by Greyhound and related remedial measures. *Greyhound Lines, Inc. v. United States*, 308 F.Supp. 1033, 1040-1041 (N.D. Ill. 1970). In June 1971, the government filed petitions in that court charging Greyhound with civil and criminal contempt of the injunction and, six weeks after the verdict in the trial court, an order finding Greyhound in contempt was entered and fines totaling $600,000 were assessed against Greyhound. *See United States v. Greyhound Corp.*, 363 F.Supp. 525 (N.D. Ill. 1973), 370 F.Supp. 881 (N.D. Ill.), *aff'd*, 508 F.2d 529 (7th Cir. 1974).

> "*The essence of Mt. Hood's antitrust claim is that Greyhound acquired bus companies whose routes circled those of Mt. Hood* and thereafter deprived Mt. Hood of connecting or 'bridge' traffic with the purpose and effect of eliminating Mt. Hood as a substantial competitor." (App. A, p. 2)[5]

The jury returned a verdict for Mt. Hood, awarding it treble damages of $13,146,090 for the twenty-year period from 1953 to 1973. The trial judge (Judge Goodwin of the Ninth Circuit sitting by designation) then awarded Mt. Hood attorneys' fees of $1,250,000 and denied Greyhound's motions for a directed verdict, for judgment notwithstanding the verdict and for a new trial. The Court of Appeals affirmed.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Decision Is Inconsistent With Section 5(12) of the Interstate Commerce Act and Conflicts With Prior Decisions of This Court.

The antitrust laws represent a fundamental national economic policy, but Congress has declared that certain regulated industries are not to be governed solely by antitrust standards of competition and monopoly. Instead, they are to be regulated by a federal agency pursuant to other standards set by Congress in the applicable regulatory statute.[6] Transportation is one of those industries, and the ICC is the agency Congress has declared should regulate it pursuant to the National Transportation Policy. The decision below, contrary to Congress' intent and the prior decisions of this Court, transfers that regulation from the ICC to private plaintiffs and federal antitrust juries. It ignores completely the requirements of the National Transportation Policy.

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5. All emphasis herein is added unless otherwise stated.

6. *See, e.g.*, Interstate Commerce Act, Part I, 49 U.S.C. §§ 1, *et seq.* (railroads); Interstate Commerce Act, Part II, 49 U.S.C. §§ 301, *et seq.* (motor carriers); Federal Aviation Act, 49 U.S.C. §§ 1301, *et seq.* (commercial aviation).

The Court of Appeals' opinion admits that, "The essence of Mt. Hood's antitrust claim is that Greyhound acquired bus companies whose routes circled those of Mt. Hood and thereafter deprived Mt. Hood of connecting or 'bridge' traffic with the purpose and effect of eliminating Mt. Hood as a substantial competitor." (App. A, p. 2) But Greyhound's acquisitions of those bus companies were approved by the ICC, and approved acquisitions are expressly immunized from antitrust attack. 49 U.S.C. § 5(12). Greyhound's conduct thereafter, "made possible" by those ICC approvals (App. A, p. 18), was subject to continuing comprehensive ICC regulation to assure its conformity to the public interest, and the ICC actually regulated it. 49 U.S.C. §§ 5(10), 316; p. 7 above. Indeed, the very conduct claimed here to violate the antitrust laws was previously the subject of extensive regulatory proceedings and the ICC issued an appropriate regulatory order to remedy it. (App. A, pp. 4-7) Nevertheless, the Court of Appeals held that that same conduct may be regulated by federal courts under antitrust standards alone and without regard to whether that regulation is consistent with the public interest standard.

That holding conflicts with the principles of antitrust preemption previously established by the Court and fails to give effect even to the express antitrust exemption for approved acquisitions mandated by 49 U.S.C. § 5(12). Instead, the immunized acquisitions were "[t]he essence of Mt. Hood's antitrust claim. . . ." (App. A, p. 2) The decision below effectively destroys the express immunity of the statute. The result is that the antitrust laws have been permitted to preempt the Interstate Commerce Act and new and unneeded antitrust litigation has been created.

A. THE COURT OF APPEALS' DECISION IS CONTRARY TO ESTABLISHED PRINCIPLES OF EXCLUSIVE REGULATORY JURISDICTION.

The prior decisions of this Court establish that the antitrust laws are preempted whenever necessary to satisfy Congress'

intent or to make the regulatory scheme work. *See Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659 (1975); *United States v. National Association of Securities Dealers*, 422 U.S. 694 (Opinion of the Court) 735, 736-737 (White, J., dissenting) (1975); *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363 (1973); *Pan American World Airways, Inc. v. United States*, 371 U.S. 296 (1963). Under Section 5 of the Interstate Commerce Act, the ICC has authority to approve acquisitions, 49 U.S.C. § 5(2), and to regulate subsequent conduct thereby made possible. 49 U.S.C. § 5(10). *See also* 49 U.S.C. § 316. There can be no doubt that Congress intended that authority to be exclusive. It said so:

> "The authority conferred by this section [Section 5] shall be exclusive and plenary . . . ." 49 U.S.C. § 5(12).

And this Court has made clear that Congress meant what it said:

> "The jurisdiction of the Commission under both § 5 and § 20a is made plenary and exclusive . . . of all other state or federal authority." *Schwabacher v. United States*, 334 U.S. 182, 197 (1948); *see Seaboard Air Line R. Co. v. Daniel*, 333 U.S. 118, 125 (1948).

The decision below does not discuss this language of Section 5(12), let alone explain how the ICC's Section 5 power to regulate Greyhound's conduct can be "exclusive and plenary" if an antitrust court can regulate that same conduct by basing a $14,400,000 judgment on it.

Moreover, even apart from the failure to follow the express language of Section 5(12), the decision of the Court of Appeals is inconsistent with the prior decisions of this Court that have found preemption of the antitrust laws in the context of other regulatory schemes. *United States v. National Association of Securities Dealers*, 422 U.S. 694 (1975); *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 682-691 (1975); *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363 (1973);

Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1963).

For example, in *Pan American*, the Court rejected an antitrust complaint charging Pan American and W. R. Grace & Co. with conspiring to monopolize air transportation on the West Coast of South America, holding that the CAB's statutory authority to regulate the "acts charged" placed the "problem . . . within the purview of the Board." 371 U.S. at 305, 312. That authority preempted the antitrust laws, because "[i]f the courts were to intrude independently with their construction of the antitrust laws, two regimes might collide." 371 U.S. at 310.

Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363 (1973), applied the *Pan American* principle to private treble damage actions. Plaintiff TWA attacked the manner in which Toolco had exercised its control of TWA obtained through a series of stock acquisitions. The acquisitions had been approved by the Civil Aeronautics Board under Section 408 of the Federal Aviation Act, 49 U.S.C. § 1378, and were immunized from antitrust attack by Section 414, 49 U.S.C. § 1384.[7] 409 U.S. at 369-376. The complaint charged that Toolco had unlawfully retained and diverted to competitors jet aircraft which were intended for TWA's use; delayed delivery of aircraft to TWA; and required TWA to lease rather than buy the aircraft. 409 U.S. at 378-379. This Court ordered TWA's complaint dismissed. The CAB's continuing jurisdiction to remedy and control Toolco's alleged abuses of power acquired in immunized acquisitions was exclusive and preempted the antitrust laws. 409 U.S. at 379-385.

Gordon v. New York Stock Exchange, Inc., 422 U.S. 659 (1975), held the antitrust laws inapplicable to activities of stock exchanges and their members to fix commission rates. The Court concluded that the Securities and Exchange Commission's authority

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7. Those Sections are, of course, the counterparts to Sections 5(2) and 5(12) of the Interstate Commerce Act.

to require the exchanges to fix "reasonable rates of commission" as determined by the standards of the Securities Exchange Act of 1934 precluded antitrust regulation of the anticompetitive price-fixing activities. 422 U.S. at 689-691.[8]

In *United States v. National Association of Securities Dealers*, 422 U.S. 694 (1975), the United States charged that the NASD had construed and implemented its rules to impose unlawful restrictions on the secondary market for mutual fund securities. The SEC had the authority to disapprove the NASD rules, 422 U.S. at 732, and that authority was held to include the power to regulate and control "the manner in which . . . [the NASD] construes and implements them." 422 U.S. at 733. This SEC "oversight" was deemed "sufficiently pervasive to confer implied immunity," 422 U.S. at 730-735, because application of the antitrust laws "poses a substantial danger that appellees would be subjected to duplicative and inconsistent standards." 422 U.S. at 735.

The principles of these decisions apply with equal force here. The ICC's power to regulate the conduct involved cannot be doubted; in fact it exercised that power. That its power is exclusive is also clear. First, the statute conferring it says so. Second, the ICC's power is as, if not more, pervasive than that of the CAB in *Hughes Tool* and *Pan American* or of the SEC in *Gordon* and *NASD*, and the conduct involved—competition among regulated carriers—is even more central to the regulatory scheme.[9] Third,

8. The SEC has no express authority to immunize such fixed rates from antitrust attack. There is no counterpart to Section 414 of the FAA or Section 5(12) of the ICA in the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a, *et seq.* Quite the contrary, the statute expressly preserves all other laws. 15 U.S.C. § 73bb.

9. *See* S. Rep. No. 482, 74th Cong., 1st Sess. 2 (1935); C. Fulda, *Competition in the Regulated Industries, Transportation* § 2.5 (1961). This fact makes antitrust preemption more appropriate here than in *Hughes Tool*. The conduct involved there was not competitive practices among carriers but anticompetitive conduct in the aircraft supply market, a matter of tangential concern to the CAB. *See Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 397-402 (1973) (Burger, C.J., dissenting).

the "danger" that Greyhound will be subjected to "duplicative and inconsistent standards" is equally substantial because the "sole aim of antitrust legislation is to protect competition,"[10] whereas the much broader standards of the National Transportation Policy govern the ICC, and it can approve conduct that is inconsistent with the antitrust laws. 49 U.S.C. preceding § 1; *Minneapolis & St. L. Ry. v. United States*, 361 U.S. 173, 187 (1959); *see* pp. 17-19 below. Therefore, by authorizing the ICC to adjudicate the legality of Greyhound's conduct "in accordance with a competitive standard inconsistent with the controlling criteria of the antitrust laws," Congress intended to "replace normal antitrust enforcement with the administrative regime." *United States v. National Association of Securities Dealers*, 422 U.S. 694, 740-741 (1975) (White, J., dissenting).

Contrary to both Congress' expressed intention and this Court's prior decisions, the Court of Appeals denied preemption because the ICC "did not approve such conduct when it approved the acquisitions" and "subsequently disapproved that conduct." (App. A, p. 11)[11] Thus the decision below makes preemption of the antitrust laws turn on whether the regulatory agency has *approved* the conduct attacked by the antitrust complaint, and not on whether the agency has the authority to regulate and remedy that conduct.

10. *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 689 (1975).

11. The Court of Appeals suggests that the ICC "did not contemplate Greyhound's challenged conduct as likely to occur." (App. A, p. 11) That is not so. The ICC approved the first two acquisitions over Mt. Hood's protest based upon the same charges Mt. Hood made here, saying:

> "Even if some restraint of competition should result, we may approve the transactions if they are otherwise consistent with the public interest." *The Greyhound Corp.*, 50 M.C.C. 123, 140 (1947) (R. 1845) (pp. 5-6, above).

The Court of Appeals relied on *Hughes Tool* for that proposition.[12] In fact that proposition is in flat conflict with the facts and holding of *Hughes Tool.* In *Hughes Tool* the CAB had not approved the type of conduct which underlay the antitrust complaint. The CAB had approved a control relationship, but not the manner in which that control would be or was exercised. Specifically, it did not approve or authorize the conduct of which TWA complained—the diversion, retention, delay in delivery or lease rather than sale of aircraft. That is demonstrated by the CAB orders, which contain no such approval, *Trans World Air., Control By Hughes,* 32 C.A.B. 1363 (1960); *Trans World Airlines, Inc., Further Control by Hughes Tool Co.,* 12 C.A.B. 192 (1950); *Transcontinental & Western Air, Inc., Further Control by Hughes Tool Co.,* 9 C.A.B. 381 (1948); *Transcontinental & Western Air, Inc., Control by Hughes Tool Co.,* 6 C.A.B. 153 (1944); by the CAB amicus brief to this Court, which disclaimed any such approval (R. 1434, 1435); and by the opinions of each of the lower courts which passed on TWA's antitrust complaint. *Trans World Airlines, Inc. v. Hughes,* 214 F.Supp. 106, 109-110 (S.D.

12. The Court of Appeals focused solely on *Hughes Tool. Gordon* and *NASD* were both decided after the appeal was briefed and argued. It said *Hughes Tool* did not apply to this case because:

> "The crux of the distinction between the two cases is that, as the Supreme Court viewed the record in *Hughes Tool,* the regulatory agency involved had considered the type of conduct which underlay the antitrust complaint and had approved it as in the public interest . . . ." (App. A, p. 11) (footnote omitted)

The Court of Appeals relied for this distinction on *In re REA Express, Inc.,* 412 F.Supp. 1239, 1258-1262 (E.D. Pa. 1976); *Air Freight Haulage Co., Inc. v. Ryd-Air, Inc.,* 408 F.Supp. 446 (S.D.N.Y. 1976) (App. A, p. 11, n.15); and *Scroggins v. Air Cargo, Inc.,* 534 F.2d 1124 (5th Cir. 1976) (App. A, p. 11, n.16). But both *REA Express* and *Scroggins* held that the antitrust laws *were* preempted, and *Air Freight Haulage* held only that the parties involved were not "air carriers" and thus were not subject to CAB jurisdiction.

N.Y. 1973); *Trans World Airlines, Inc. v. Hughes,* 332 F.2d 602, 610 (2d Cir. 1964); 449 F.2d 51, 56 (2d Cir. 1971).[13]

This Court reversed and ordered the complaint dismissed, not because the CAB had approved Toolco's anticompetitive conduct, but because the lower courts were wrong in holding that such approval was necessary for preemption:

> "It is said, however, that while the Board modified its original 'control' order under § 408 so as to permit sale or lease of the aircraft out of which the alleged antitrust violations occurred, *the approval of the Board did not sanction the precise way in which Toolco allegedly used the power to the disadvantage of TWA. But that is not an answer to the problem of exemption.*" 409 U.S. at 379.

The answer to the problem is that

> "[T]he *authority* of the Board to grant the power to 'control' and to investigate and alter the manner in which that 'control' is exercised leads us to conclude that this phase of CAB jurisdiction, like the one in the *Pan American* case, preempts the antitrust field." 409 U.S. at 385.[14]

Decisions of this Court both before and after *Hughes Tool* also make clear that antitrust preemption does not turn on an agency's approval of anticompetitive conduct; instead, it turns on the agency's authority to regulate the conduct. In *Pan American World Airways, Inc. v. United States,* 371 U.S. 296 (1963), the CAB had not approved the alleged anticompetitive practices; indeed it had

13. Indeed, in *Hughes Tool* the Second Circuit specifically rejected preemption for the same reason that the Ninth Circuit did so here. It said "the CAB orders did not constitute blanket approval of the claims in the complaint and hence were not a defense to TWA's action." *Trans World Airlines, Inc. v. Hughes,* 449 F.2d 51, 56 (2d Cir. 1971); *compare,* App. A, p. 11. This Court, of course, reversed and held that reasoning unsound. 409 U.S. at 379.

14. If the CAB had approved the conduct involved, the lengthy majority and dissenting opinions of this Court would have been unnecessary, because approved conduct is automatically immunized. 49 U.S.C. § 1384.

in large part *disapproved* them, and, as in this case, had required corrective measures. See 371 U.S. at 300, n.5; *Additional Service to Latin America,* 6 C.A.B. 857, 914 (1946). This Court's conclusion that the antitrust laws were preempted was based upon the agency's power to regulate the conduct complained of, not its approval of them, because:

> "If the courts were to intrude independently with their construction of the antitrust laws, two regimes *might* collide." 371 U.S. at 310.

In *Gordon v. New York Stock Exchange, Inc.,* 422 U.S. 659 (1975), the Court noted that the SEC had acted to require competitive commission rates. *See* 422 U.S. at 675-676. Nevertheless, the disapproved fixed commission rates retained immunity from the antitrust laws.

Whether an agency's regulatory jurisdiction is exclusive depends on Congress' intent and not on the fortuities of whether the conduct was the subject of an actual agency proceeding and, if so, what action the agency took with respect to it. If Congress intended the regulatory jurisdiction to be exclusive, the agency "need not actually have approved the conduct at issue or even have been aware of it, so long as the agency had the power to exercise control over the general class of conduct if it chose to do so." Note, *AT&T and the Antitrust Laws: A Strict Test for Implied Immunity,* 85 Yale L.J. 254, 261 (1975). The decision of the Court of Appeals in this case follows precisely the opposite principle and thus fails to follow what *Hughes Tool, Pan American* and *Gordon* teach.

The root of the Court of Appeals' error seems to be in its reasoning that because the ICC disapproved Greyhound's conduct, it is not "necessary to exempt Greyhound's conduct from antitrust restraints 'to make the [Interstate Commerce Act] work.'" (App. A, p. 9) But that misunderstands the nature

of the problem.[15] The problem is not simply that an agency might find conduct lawful which an antitrust court finds unlawful, although that might happen. The problem is the conflict between competing jurisdictions, which, resting on different statutes, will apply different standards and different remedies to the same conduct.[16]

Applying antitrust standards and remedies to "disapproved" conduct interferes with the regulatory scheme just as much as does applying them to approved conduct. It is one thing for the ICC

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15. This Court has explicitly rejected the idea that exemption turns on whether the particular conduct attacked is necessary to make the regulatory scheme work. *Gordon v. New York Stock Exchange, Inc.,* 422 U.S. 659, 687 (1975) (disapproving a portion of the decision in *Thill Securities Corp. v. New York Stock Exchange, Inc.,* 433 F.2d 264 (7th Cir. 1970), *cert. denied,* 401 U.S. 994 (1971)); *cf., San Diego Bldg. Trades Council v. Garmon,* 359 U.S. 236, 246-247 (1959). Like the United States in *Gordon,* the Court below has confused two questions:

> "We believe that the United States, as *amicus,* has confused two questions. On the one hand, there is a factual question as to whether fixed commission rates are actually necessary to the operation of the exchanges as contemplated under the Securities Exchange Act. On the other hand, there is a legal question as to whether allowance of an antitrust suit would conflict with the operation of the regulatory scheme which specifically authorizes the SEC to oversee the fixing of commission rates. The factual question is not before us in this case. Rather, we are concerned with whether antitrust immunity, as a matter of law, must be implied in order to permit the Exchange Act to function as envisioned by the Congress. The issue of the wisdom of fixed rates becomes relevant only when it is determined that there is no antitrust immunity." 422 U.S. at 688. *See* S. Robinson, *Recent Antitrust Developments: 1975,* 76 Colum. L. Rev. 191, 222-224 (1976).

16. In this case, for example, Mt. Hood claimed that if Greyhound complied with the law Mt. Hood would carry 95 per cent of all relevant bus traffic. In awarding Mt. Hood damages on that basis, the jury effectively imposed on Greyhound the *requirement* to promote Mt. Hood's service sufficiently to ensure that at least 95 per cent of the relevant traffic uses it. Backed up by treble damage sanctions that is an imposing standard. But Greyhound's promotion of Mt. Hood's service was also the subject of intense and lengthy regulatory proceedings, and nowhere did the ICC impose or make reference to such a standard. In short, this is a case in which Greyhound has been subjected to different requirements, and the antitrust court both punished and required what the ICC did not.

to tell Greyhound to change its practices to conform to the public interest; it is a very different thing for a federal court to assess $14,400,000 against Greyhound for those practices with no consideration by the ICC or anyone else of whether that staggering penalty serves the National Transportation Policy. Would that policy be served if judgments such as that drove carriers into insolvency and thereby deprived the traveling public of needed bus service? If "disapproval" by the ICC were to open the antitrust floodgates, then the ICC clearly could not perform its duties pursuant to the standards Congress prescribed in the regulatory statute. It could not regulate conduct by applying Interstate Commerce Act standards and remedy conduct inconsistent with those standards without also considering whether subjecting the carrier to additional attack under the antitrust laws would further the National Transportaion Policy. The undesirable consequences of antitrust litigation entailed by "disapproval" might well compel the ICC to approve conduct inconsistent with the public interest.[17] In those circumstances both antitrust and public interest policies are frustrated.

Similarly, in determining whether to make acquisitions and in operating the properties acquired, carriers would be required to judge their conduct not only by the public interest standards of the Interstate Commerce Act, but also by the standards of the antitrust laws, which might or might not apply. The resulting confusion and potential for massive liability would surely discourage carriers from making acquisitions that would serve the public interest. That is just the opposite of what Congress

17. When the antitrust jury is told that the ICC had disapproved the conduct, as this one repeatedly was (*e.g.*, Exs. 426, pp. 3-4, 464, 467, 468; Tr. 1298-1299, 1302-1310, 2515-2518, 6741-6743), an adverse verdict is almost inevitable. *Cf. Buffalo Forge Co. v. United Steelworkers of America*, 428 U.S. 397, 412 (1976) (arbitrator would be "heavily influenced or wholly pre-empted" by preliminary judicial determination).

intended when it passed the Interstate Commerce Act. *County of Marin v. United States*, 356 U.S. 412 (1958).

The opinion below fails adequately to consider any of this, and the decision reached has a profound impact on the working of the Interstate Commerce Act and the administration of the antitrust laws in the context of a regulated industry. This Court should review the important questions presented.

B. THE COURT OF APPEALS' DECISION IS CONTRARY TO THE EXPRESS IMMUNITY PROVISION OF 49 U.S.C. § 5(12).

Quite apart from the issue of antitrust preemption by virtue of the ICC's continuing jurisdiction, the decision below raises important questions concerning the effect of the express immunity mandated by 49 U.S.C. § 5(12). That section provides that for each acquisition approved by the ICC Greyhound was

> ". . . relieved from the operation of the antitrust laws . . . insofar as may be necessary to enable [it] to carry into effect the transaction so approved . . . and to hold, maintain, and operate any properties and exercise any control of franchises acquired through such transaction." 49 U.S.C. § 5(12).

The purpose of Section 5 of the Interstate Commerce Act is "to facilitate merger and consolidation" to fulfill Congress' desire "that the industry proceed toward an integrated national transportation system." *County of Marin v. United States*, 356 U.S. 412, 416, and authorities cited at n.7, 417-418 (1958); *see, e.g.*, H.R. Rep. No. 2016, 76th Cong., 3d Sess. 61 (1940). Congress expected that the need for a national transportation system would require the ICC to approve acquisitions which "might otherwise violate the antitrust laws." *Minneapolis & St. L. Ry. v. United States*, 361 U.S. 173, 187 (1959). Therefore, it is essential that approved acquisitions be immunized from antitrust attack, regardless of any anticompetitive purpose or effect. *See United States v. Rock Royal Co-operative, Inc.*, 307 U.S. 533, 560 (1939); *Aloha Airlines, Inc. v. Hawaiian Airlines, Inc.*, 489 F.2d 203, 206 (9th Cir. 1973), *cert. denied*, 417 U.S. 913 (1974). Grey-

hound's acquisitions in the Pacific Northwest were not insidious isolated efforts to "get" Mt. Hood. They were simply part of a nationwide program of integration undertaken in accordance with Congress' mandate, and Section 5(12) immunizes them. *See generally* C. Fulda, *Competition in the Regulated Industries, Transportation,* § 5.36 (1961).

Nevertheless, this case was tried (and reviewed) as if Section 5(12) never existed. It was tried as an unfettered monopolization case—an attack on the market position that Greyhound secured by the acquisitions, their alleged anticompetitive purpose and effect and the anticompetitive conduct they made possible. (*See* App. A, pp. 2 and 18; *see also, e.g.,* Ex. 126; Tr. 340-343A, 439-440, 3469-3471, 3475-3515, 6277-6280; and Appendix B to Greyhound's opening brief to the Ninth Circuit.) No limitation was placed on the use of evidence of immunized transactions, and the court refused to instruct the jury that the acquisitions and Greyhound's conduct necessary "to hold, maintain and operate" the acquired companies were immune from antitrust attack. To the contrary, the jury was expressly instructed that Greyhound's actions to "maintain" monopoly power (acquired through immunized transactions) was a violation of the Sherman Act even if they "were wholly innocent or legal acts." (Tr. 6752-6753, 6759) How can that be squared with Section 5(12)?[18]

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18. The Court of Appeals says that "the jury could not base a finding of monopolization on the approved acquisitions themselves; improper use of the acquired power was required." (App. A, p. 16) But that is only half right. The jury was told the second, but it was not told the first. (Tr. 6752-6753) It was not told that Greyhound's acquisitions were lawful and immune from antitrust attack. And while the jury was given the general instruction that an "improper use" of power is required (Tr. 6753), it was specifically instructed that such an "improper use" could be based on "wholly innocent and legal acts" to maintain the immunized market position:

> "In showing this element of a deliberate purpose, the plaintiff is not required to prove that defendants engaged in any unlawful or predatory or unfair acts or practices. *Acts done to maintain, foster or increase a monopoly may be wholly innocent or legal acts, yet constitute evidence of a purpose to monopolize.*" (Tr. 6759)

The Court of Appeals' answer is that Section 5(12) does not apply to this case because the ICC determined that Greyhound's conduct was not "necessary." (App. A, p. 7) Thus, the decision below stands for the proposition that if *some* of a carrier's conduct is "unnecessary," then *none* of it is immune. But that is a *non sequitur*. The fact that some of Greyhound's conduct was found to be "unnecessary" does not mean that all of it was, and there is nothing in the statute to suggest that Congress intended such an illogical result.[19] Indeed, after consideration of all of Mt. Hood's charges, the ICC did not withdraw its orders approving the acquisitions; those acquisitions, including their purpose and effect, are still expressly immunized. Yet this solid core of immunity was disregarded, and the jury was permitted to decide the case in ignorance of it.[20]

What function is left to the ICC and what becomes of the National Transportation Policy if acquisitions approved and immunized in the public interest can be the cornerstone of an antitrust attack?

This Court should grant certiorari to review the application of the immunity provisions of 49 U.S.C. § 5(12) to a private action for treble damages, because the decision below effectively eliminates that section and Congress' purpose in enacting it.

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19. The Court of Appeals' premise is not supported by the record either, for the ICC made no decision about what conduct was or was not necessary in the context of the antitrust exemption. The ICC did not even address the question of Section 5(12).

20. The Court of Appeals approved the refusal to instruct on 49 U.S.C. § 5(12) on the ground that antitrust immunity is a "legal question, not an issue of fact for the jury." (App. A, p. 13) That might make sense if the trial court had determined the scope of immunity and excluded evidence of immunized conduct. But it did not. It admitted all that evidence and tossed the whole case up for the jury to decide, without instructing it that the acquisitions were immune from antitrust attack. (p. 20, above)

II. The Court of Appeals' Decision Is Contrary to Section 5(a) of the Clayton Act and Presents Important Questions of Antitrust Law and Enforcement.

Over Greyhound's objections the trial judge admitted in evidence consent decrees into which Greyhound had entered in 1947 and 1957.[21] The court also permitted extensive testimony and argument concerning the decrees.[22] Finally, the court instructed the jury in detail about specific acts prohibited by the decrees (Tr. 6742-6747) and then told the jury to use the decrees in determining,

> "the issues of motive, intent and purpose of Greyhound and the reasonableness of their behavior under Section 1 and 2 of the Sherman Act . . . ." (Tr. 6747)

The decision of the Court of Appeals upholds what the trial court did without discussing the serious questions presented or the consequences of its action.

Absent Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), no judgment or decree in a prior government case would be admissible. *See Buckeye Powder Co. v. Du Pont Powder Co.*, 248 U.S. 55, 63 (1918) (Holmes, J.); *Buckhead Theatre Co. v. Atlanta Enterprises, Inc.*, 327 F.2d 365 (5th Cir.), *cert. denied*, 379 U.S. 888 (1964); *International Shoe Mach. Corp. v. United Shoe Mach. Corp.*, 315 F.2d 449, 459 (1st Cir.), *cert. denied*, 375 U.S. 820 (1963); Timberlake, *The Use of Government Judgments or Decrees in Subsequent Treble Damage Actions Under the Antitrust Laws*, 36 N.Y.U.L. Rev. 991, 994 (1961).

Nor does Section 5(a) support the evidentiary use of the consent decrees in this case. Section 5(a) provides:

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21. Both decrees were entered before any testimony was taken, and each of them states that it was entered without admission by any party of any issue. (Ex. 62, p. 2; Ex. 265, p. 1)

22. See, Exs. 62, 265, 268; Tr. 257-259, 263-267, 370-371, 906, 908-916, 1263-1264, 1401-1413, 1430-1431, 1477, 1792-1794, 2062-2065, 2071, 2243, 2246, 3463-3469, 3477, 3484, 3488, 3591-3599, 3651-3659, 3724-3727, 3772-3774, 5535-5537; Closing Argument Tr. 6660-6661.

> "A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws *to the effect that a defendant has violated said laws* shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, *as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto:* Provided, *That this section shall not apply to consent judgments or decrees entered before any testimony has been taken* or to judgments or decrees entered in actions under section 15a of this title." 15 U.S.C. § 16(a).

By its terms, then, Section 5(a) applies only to a judgment or decree "to the effect that a defendant has violated [the antitrust] laws." It is plainly not applicable to these decrees, which expressly disclaim any admission that Greyhound violated the antitrust laws. (Ex. 62, p. 2; Ex. 265, p. 1) Section 5(a) also applies only as to "matters respecting which" the judgment "would be an estoppel" between the defendant and the government. *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 568 (1951); *see Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 316-317 (1965). It is plainly not applicable to these decrees, which were settlements deciding nothing and which therefore would have no collateral estoppel effect even between Greyhound and the government. *United States v. International Building Co.*, 345 U.S. 502 (1953); Restatement of Judgments § 68, Comments h, i (1942); Restatement (Second) of Judgments § 68, Comment e (Tent. Draft No. 4, 1977).

Moreover, the consent decrees were entered "before any testimony [had] been taken," and thus the use of them as evidence on the ultimate issues under the Sherman Act is in square conflict with the proviso of Section 5(a). Congress reconfirmed that

that proviso means what it says when it reformed consent decree procedures as part of the Antitrust Procedures and Penalties Act in 1974. The Senate Report on the bill stated:

> "Section 2(h) provides that neither the public impact statements nor any proceedings utilized by the court to make its public interest determination shall be admissible in an action for damages, either by the government or a private party. *It is the intent of the Committee to retain the provision presently in Section 5 of the Clayton Act which prevents the use of a consent decree in any way in subsequent litigation as prima facie evidence of a violation.* As previously stated, the Committee wishes to retain the consent judgment as a substantial antitrust enforcement tool." S. Rep. No. 93-298, 93d Cong., 1st Sess. 7 (1973). *See also* H.R. Rep. No. 93-1463, 93d Cong., 2d Sess. 6 (1974).

Even if not flatly prohibited by the words of Section 5(a), the decision below conflicts with its purpose to encourage settlement of government antitrust cases by consent decrees. *See City of Burbank v. General Electric Co.*, 329 F.2d 825, 835 (9th Cir. 1964). The Senate Report on antitrust and penalties also re-emphasized that purpose. (See quotation, above.) The Justice Department's consent decree program is of "crucial" importance to the effective enforcement of the antitrust laws.[23] The decision below, if this

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23. "Approximately 80 percent of all complaints filed by the Antitrust Division of the Department of Justice are settled prior to trial by the entry of a consent decree . . . . Obviously, the consent decree is of crucial importance as an enforcement tool, since it permits the allocation of resources elsewhere." S. Rep. No. 93-298, 93d Cong., 1st Sess. 5 (1973).

See also Hearings on H.R. 9203, H.R. 9947 and S. 782 (Consent Decree Bills) Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 93d Cong., 1st Sess., ser. 20, at 61-63, 84-85, 87 (1973); ABA, Antitrust Law Developments 237 (1975) and First Pocket Part Supp. at 54; Note, *Section 5(a) of the Clayton Act and Offensive Collateral Estoppel in Antitrust Damage Actions*, 85 Yale L.J. 541, 561 (1976); *Symposium: Relationships Between Government Enforcement Actions and Private Damage Actions*, 37 Antitrust L.J. 823, 842-843 (1968); J. Flynn, *Consent Decrees in Antitrust Enforcement: Some Thoughts and Proposals*, 53 Iowa L.Rev. 983, 1003 (1968).

Court permits it to stand, will seriously undermine, if not kill, that program. As the decision deprives Greyhound of the benefit of its bargain with the government in entering into the decrees, it requires any defendant considering a consent decree settlement to discount entirely the supposed benefits of Section 5(a). In other words it eliminates the incentive for defendants to settle government cases.

Finally, the Ninth Circuit's decision is inconsistent with the weight of prior decisions, including one of its own, which have held that consent decrees within the proviso of Section 5(a) are inadmissible in antitrust litigation.

> "[A] consent judgment whether it be in a civil case or a nolo plea in a criminal case, or any evidence thereof, is not admissible in a treble damage action and can have no real purpose except to attempt to prejudice a defendant before a jury." *Control Data Corp. v. IBM*, 306 F.Supp. 839, 844 (D. Minn. 1969), *aff'd per curiam sub nom., Data Proc. Fin. & Gen. Corp. v. IBM*, 430 F.2d 1277 (8th Cir. 1970); *City of Burbank v. General Electric Co.*, 329 F.2d 825, 834 (9th Cir. 1964); *Baush Mach. Tool Co. v. Aluminum Co. of America*, 79 F.2d 217, 226 (2d Cir. 1935); *Kunc v. ARA Services, Inc.*, 414 F.Supp. 809 (W.D. Okla. 1976).

The Court of Appeals' unprecedented decision was reached without considering Section 5(a), Congress' purpose in enacting it, or the cases which have construed it.[24] It raises serious ques-

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24. The Court of Appeals says only that the "admissibility of a consent decree is a matter committed to the court's discretion" and that "there was no abuse of discretion here." (App. A, p. 19) For authority it cites two cases. In *Control Data Corp. v. IBM Corp.*, 421 F.2d 323 (8th Cir. 1970), two judges of the Eighth Circuit declined to allow plaintiffs to file an interlocutory appeal from a pretrial order striking from the complaints all allegations relating to IBM's consent decrees and barring any evidentiary use of reference to the decrees at the trial. *Vitagraph, Inc. v. Perelman*, 95 F.2d 142 (3d Cir.), *cert. denied*, 305 U.S. 610 (1938), upheld the admission of a consent decree *in a non-jury case* without any discussion of the matter and only as evidence of a fact apparently admitted in the decree. (95 F.2d at 146)

tions concerning the effect to be given to consent decrees "before any testimony has been taken" under Section 5(a) of the Clayton Act and jeopardizes the major part of the government's antitrust enforcement program. This Court has never before considered these questions. It ought to do so now.

III. The Court of Appeals' Decision Presents Important Questions of the Application and Tolling of the Statute of Limitations in Antitrust Cases.

The complaint in this action was filed on July 5, 1968. The statute of limitations therefore should bar all claims prior to July 5, 1964. 15 U.S.C. § 15b. The Court below, however, upheld a damage award for claims spanning twenty years, from 1953 to 1973. That five-fold expansion of the statutory damage period was based upon a combination of rulings producing a bizarre result reminiscent of a Rube Goldberg contraption.

First, adopting an unprecedented theory, the Court of Appeals permitted tolling for alleged fraudulent concealment from 1953 to December 14, 1960. Then it saved those twenty-year old claims from being barred on December 14, 1964, by holding that the statute was tolled once again, this time under the Clayton Act, 15 U.S.C. § 16(i), by the government's request on precisely that date for leave to intervene in an ICC proceeding instituted by Mt. Hood. Thus, the Court of Appeals extended and enlarged and combined these exceptions to the four-year statute of limitations until they swallowed it up. The decision presents important questions concerning the application of the statute of limitations prescribed by the Clayton Act which this Court has never considered.

A. THE DECISION BELOW IS CONTRARY TO 15 U.S.C. § 16(i).

Tolling under Section 16(i) was essential to the award of all damages beyond the normal four-year period—some $5,194,617 after trebling. Section 16(i) provides:

> "Whenever any civil or criminal proceeding is *instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws,* but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private or State right of action arising under said laws and *based in whole or in part on any matter complained of in said proceeding* shall be suspended during the pendency thereof and for one year thereafter. . . ." 15 U.S.C. § 16(i).

Not one of the statute's explicit requirements is satisfied here. The relevant facts are as follows:

On or about October 7, 1964, Mt. Hood filed with the ICC a "petition . . . for an order reopening [certain Greyhound acquisition cases] and attaching certain terms, conditions and limitations to the exercise of the privileges therein granted." (R. 1410) On December 14, 1964, the United States petitioned for leave to intervene. The petition did not allege that Greyhound was violating the antitrust laws (or any other law), and it sought no relief or remedy against Greyhound. (R. 2266, *et seq.*) It took no position on the merits of the dispute between Mt. Hood and Greyhound, and expressly disclaimed any knowledge of the matters complained of by Mt. Hood:

> "We have no way of knowing whether those of Mount Hood's allegations which Greyhound denies are true or false; resolution of such controversies is a typical function of a hearing." (R. 2268)

The United States was not permitted to intervene until May 27, 1965. It raised no new issues. Indeed, the ICC specifically limited its participation to the Interstate Commerce Act issues Mt. Hood had raised. (R. 2276)

The Court of Appeals held that these facts activated Section 16(i) and tolled the statute of limitations commencing December 14, 1964, the date on which the petition for leave to intervene

was first filed, and four years to the day after the date on which Mt. Hood was later (coincidently) found by the jury to have "discovered" its cause of action. That holding is erroneous and contrary to Section 16(i) in every respect.

First, the holding applies Section 16(i) to a proceeding instituted by Mt. Hood, not the United States. A party who intervenes in a proceeding previously brought by someone else has not "instituted" that proceeding.

Second, since the petition for leave to intervene did not charge Greyhound with any wrongdoing, took no position on the merits and sought no relief, this case is not based on any matter "complained of" by the government in the ICC proceeding.[25] *See Leh v. General Petroleum Corp.*, 382 U.S. 54, 65 (1965) ("In general, consideration of the applicability of [16(i)] must be limited to a comparison of the two complaints on their face.").

Third, the Court of Appeals applied Section 16(i) to a proceeding brought under Section 5(10) of the Interstate Commerce Act, and which concerned only the enforcement of that Act. (R. 2266, 2276) In no way could Mt. Hood's institution of that proceeding be considered an action to "prevent, restrain, or punish violations of the antitrust laws,"[26] and intervention by the United States did not change that. The United States sought no relief at all. Even if the government had attempted and been permitted to assert antitrust violations and sought some relief in respect to them, the ICC is without power directly to enforce the antitrust laws. *McLean Trucking Co. v. United States*, 321 U.S. 67, 79 (1944).

25. The government's primary purpose in seeking to intervene was to urge the ICC not to dispose of the case by summary action, but to hold a full hearing for the benefit of *both* parties. (R. 2267-2269)

26. The "antitrust laws" as used in Section 16(i) are specifically limited to the Sherman Act, Clayton Act and the Wilson Tariff Act. 15 U.S.C. § 12. That list is exclusive. *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373, 375-376 (1958).

Finally, the Court of Appeals erred in holding that Section 16(i) comes into operation on the date on which the United States first seeks leave to intervene. Until the ICC granted its petition, the government was not in the case. It had no right to participate or take any action in the proceedings. *See* ICC Rule 72(e), 49 C.F.R. § 1100.72(e) (1976).[27] The petition to intervene was not granted until May 27, 1965, and that is the earliest date on which it could be said that the government "instituted" that proceeding, assuming that such a petition could ever be said to have "instituted" it.[28]

In sum, the ICC case involved neither a civil or criminal proceeding "instituted by the United States," nor any proceeding "to prevent, restrain or punish violations of any of the antitrust laws." And this case is not based on "any matter complained of in said proceeding," because the government did not complain of anything in that case. The petition of the United States for leave to intervene in a proceeding previously instituted by plaintiff to determine possible violations of the Interstate Commerce Act, which makes no charges, seeks no relief and is restricted to the issues framed by plaintiff, is not within either the letter or the spirit of Section 16(i).

The Court of Appeals chose not to follow the "literal wording of Section 16(i)." (App. A, p. 23) Instead it relied on the per-

27. The government's petition might have been denied. Had it been, the statute clearly would not have been tolled. No one contends that the mere filing of a petition for leave to intervene tolled the statute of limitations. The order granting intervention could not retroactively toll the statute, because by then it had already run and there was nothing to toll.

28. That conclusion has two effects on the judgment here. First, since the jury found that plaintiff knew or should have known of its claims on December 14, 1960, those claims were time barred after December 14, 1964, and Section 16(i) cannot rescue them because the petition to intervene was not granted until May 27, 1965. Second, any tolling under the Section would extend the claim period back only to May 27, 1961. Since there is no evidence of the amount of damage suffered in the period May 27, 1961, to July 5, 1964, the verdict and judgment to that extent reflect an incorrect damage period.

ceived purpose of the statute: to permit "private litigants to have the benefits that may flow from governmental antitrust enforcement efforts" (App. A, p. 23), because it believed that the petition for leave to intervene was the "functional equivalent of a direct action. . . ." (*Id.*, p. 24) But that purpose hardly justifies rewriting the statute as the Court of Appeals has done. And the reasoning on which the Court of Appeals relies does not even fit this case. The government made no antitrust enforcement efforts here; its petition to intervene was not the equivalent, "functional" or otherwise, of an antitrust complaint, and the only benefit Mt. Hood derived from the government's intervention in the ICC proceeding is the tolling of the statute itself.[29] Moreover, the Court of Appeals' novel "functional equivalent" test would require a detailed review of the record in each case to see whether the position ultimately taken by the government was or was not the "functional equivalent" of direct action. That creates more problems than it solves. *Cf. Leh v. General Petroleum Corp.*, 382 U.S. 54, 65 (1965). The possibilities of government participation and the circumstances under which it might occur are limitless.[30] The government may be with one party on one issue, with the other on a second and with neither on a third. The uncertainty created by the decision below by itself provides a compelling reason to grant certiorari.

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29. The Court of Appeals says that the ICC "proceedings were of a kind likely to produce benefits to . . . plaintiff in a subsequent antitrust suit," and that "governmental investigative and legal resources were made available to fully develop the facts and the law favorable to the common position of the government and Mt. Hood on these issues." (App. A, pp. 23-24) Nothing is cited to justify those statements. The government's petition did not endorse Mt. Hood's charges or assert any position in "common" with Mt. Hood. (p. 27, above)

30. In some administrative proceedings, government participation may even occur without notice to the subsequent private treble damage defendant, leaving him in a position where he had no reason to preserve records and other information necessary for his defense during the period of the administrative proceedings.

Finally, the ramifications of the Court of Appeals' extension of Section 16(i) are truly alarming. The number and variety of regulatory proceedings in which the Justice Department participates to express its views are legion.[31] No one previously has even suggested that the statute of limitations was tolled by reason of such participation. Unless this Court acts, the Court of Appeals' decision will revive countless stale antitrust claims previously believed by everyone to be long since gone.

This Court has never addressed the questions raised here concerning the scope of Section 16(i). The nearest it has come was twelve years ago in *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965), where the Court held the statute was tolled by a Federal Trade Commission action to enforce Section 7 of the Clayton Act.[32] Even that application of the tolling provision, supported by only five members of the Court, was recognized to be tenuous.[33] The Court of Appeals' application of Section 16(i) in this case goes much further. It is plainly impossible to justify, and clearly presents a question of importance in the administration of the Clay-

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31. The Assistant Attorney General in charge of the Antitrust Division is charged with responsibility to intervene and assert antitrust considerations in proceedings before "such agencies as the Civil Aeronautics Board, Interstate Commerce Commission, Federal Communications Commission, Federal Maritime Commission, Federal Power Commission, Federal Reserve Board, Federal Trade Commission, Nuclear Regulatory Commission, and Securities and Exchange Commission, . . ." 28 C.F.R. Ch. 1, Part O, Subpart H, § 0.40(b) (1976).

Any CCH Trade Regulation Report reveals that the Antitrust Division takes its responsibilities seriously. Excerpts from just one such report are contained in Appendix F to this petition.

32. Section 7 of the Clayton Act, unlike Section 5 of the Interstate Commerce Act, is one of the "antitrust laws."

33. The Solicitor General, arguing for the application as *amicus curiae*, admitted that the " 'result is difficult and perhaps impossible to justify in terms of conventional analysis of the text and legislative history . . .' " 381 U.S. at 324 (Black, J., dissenting).

ton Act. *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 314 (1965). The Court should grant certiorari.

B. THE COURT OF APPEALS' DECISION RAISES SERIOUS QUESTIONS CONCERNING THE APPLICATION OF THE DOCTRINE OF FRAUDULENT CONCEALMENT TO PRIVATE ANTITRUST LITIGATION.

This Court has never considered whether the doctrine of fraudulent concealment can be used to alter the basic four-year statute of limitations in private antitrust litigation, or, if it can, what legal principles should govern its use. This case provides an appropriate opportunity for the Court to do so.

The Court of Appeals said that *prior* to December 14, 1960:

> 1. Mt. Hood complained about Greyhound's quoting and routing practices; (App. A, p. 21)
>
> 2. Mt. Hood suspected Greyhound of unlawful conduct; (App. A, p. 21)
>
> 3. Mt. Hood had knowledge of Greyhound's violations of consent decrees that prohibited practices the same as those charged in this case; (*See* App. A, pp. 19, 21-22) and
>
> 4. Mt. Hood was aware of the growth of Greyhound's power and of the commission of predatory acts by some of its agents. (App. A, p. 22)[34]

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34. Even that description of the record of Mt. Hood's knowledge of its claims does not do it justice. The record showed that Mt. Hood complained repeatedly, often under oath, from 1943 on of the very practices that were alleged in this case to violate the antitrust laws. It also showed repeated charges by Mt. Hood, some again under oath, that Greyhound's practices were inconsistent with the assurances it had given to Mt. Hood and the ICC. (Tr. 3599, 3814-3817, 3832, 3834, 3836, 3858-3859; Ex. 45, pp. 227, 231, 236; Exs. 197, 215, 297, L-3, E-11-A, G-11-A, D-12) Indeed, the record was so compelling that the trial court said it would be *"irresponsible"* to submit the fraudulent concealment question to the jury or to allow any verdict based on it to stand. (Tr. 4888-4889, 5969, 6701) But it did just that, with no explanation at all. (App. C)

Nevertheless, the Court of Appeals affirmed the jury's finding of fraudulent concealment[35] because, in response to Mt. Hood's complaints, Greyhound denied that the incidents occurred or represented that they were isolated and not countenanced by management. (App. A, pp. 21-22) Thus, the decision rests upon a novel and unsound rule of law: One who suspects wrongdoing and even has charged another with it under oath may be excused from his duty to file his action if the other denies the charges. Under the decision below, denial of alleged wrongdoing constitutes fraudulent concealment that tolls the statute.[36]

But, as a matter of common sense, Greyhound's denials and representations could not take away the knowledge (or at least notice) that Mt. Hood had when it made its complaints in the first place. And the previously decided cases, including Ninth Circuit cases, hold as a matter of law that such denials and representations do not extend the limitations period:

> "Restatements of the fraudulent representation do not of themselves constitute concealment, and where a party is once put upon notice of fraud he cannot avoid the consequences

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35. The jury found in answers to special interrogatories that there was fraudulent concealment from 1953 to 1964, but also that Mt. Hood knew or should have known of the antitrust violation on December 14, 1960. This latter finding was thus inconsistent both with the other special verdict and with the general award of damages for the 1953-1964 period. Contrary to Rule 49(b), Fed.R.Civ.P., the trial court did nothing to correct the inconsistency. The Court of Appeals misstates that the jury found fraudulent concealment only until December 14, 1960 (App. A, pp. 20-21), and thus ignores the problem of the inconsistency.

Quite apart from their inconsistency, the jury's findings are plainly irrational. Nothing relevant to Mt. Hood's discovery of its claims occurred on or around December 14, 1960, but that just happened to be four years to the day before the government filed its petition for leave to intervene in Mt. Hood's ICC proceedings. Thus, a finding plainly based upon something other than evidence was a critical part in the elaborate construct by which the decision below extended the damage period to a full twenty years.

36. In fact, the Court of Appeals even upheld an instruction on fraudulent concealment by which the jury was told that Mt. Hood "had the right to rely" upon such denials and representations. (Tr. 6777-6778)

of his constructive knowledge of the fraud nor fulfill his duty to investigate by going to the party he suspects of the fraud. He cannot desist from further investigation because he is reassured of the truth of the original representations." *Feak v. Marion Steam Shovel Co.*, 84 F.2d 670, 673 (9th Cir.), *cert. denied*, 299 U.S. 604 (1936).

"[M]ere nondisclosure or denial of the existence of a conspiracy does not constitute fraud or deceit for tolling purposes. If it did, the tolling exception to the statute of limitation would eclipse the basic statute itself." *Hall v. E. I. Du Pont De Nemours & Co.*, 312 F.Supp. 358, 362 (E.D.N.Y. 1970)[37]

The Court of Appeals' explanation that "the jury weighed the evidence" and found fraudulent concealment (*see* App. A, p. 21, n.28) obviously begs the question. The question is not what a plainly confused jury *did* conclude. The question is: under the law, *should it have been permitted* to reach such a conclusion given the degree of Mt. Hood's knowledge and suspicion recognized even by the Court of Appeals? (pp. 32-33, above)

The Ninth Circuit's attempt to explain away Mt. Hood's admitted knowledge of Greyhound's violations of consent decrees is no more satisfactory. It says Mt. Hood's knowledge of conduct in violation of the consent decrees is not equivalent to notice of the alleged antitrust violations because violations of consent decrees are

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37. *See also Suckow Borax Mines Consolidated v. Borax Consolidated, Ltd.*, 185 F.2d 196, 209 (9th Cir. 1950), *cert. denied*, 340 U.S. 943 (1951); *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F.2d 742, 752 (9th Cir. 1936), *cert. denied*, 299 U.S. 613 (1937); *Prather v. Neva Paperbacks, Inc.*, 446 F.2d 338, 341 (5th Cir. 1971) (plaintiff suspected he had a cause of action. "The bells do not toll the limitations statute while one ferrets the facts."); *Falls Sand & Gravel Co. v. Western Concrete, Inc.*, 270 F.Supp. 495, 504 (D. Mont. 1967); *Philco Corp. v. Radio Corp. of America*, 186 F.Supp 155 (E.D. Pa. 1960).

not in themselves violations of the antitrust laws. (App. A, pp. 21-22) But that misses the point. The point is that *in this case*, according to the Court of Appeals itself, the practices which violated the consent decrees were ". . . the same as or similar to those charged in this suit." (App. A, p. 19) Therefore, Mt. Hood's knowledge of violations of the consent decrees necessarily was knowledge of the practices which are its antitrust claim here, and what one knows is not concealed from him. Conversely, if those acts in violation of the consent decrees were not violations of the antitrust laws, neither are the acts upon which this suit is based—they are the same acts.

This Court has never considered the circumstances under which fraudulent concealment may toll the statute of limitations in a private antitrust case. Indeed, this Court has never even considered whether the equitable doctrine of fraudulent concealment can be used at all to toll the four-year limitations period prescribed in the Clayton Act. 15 U.S.C. § 15b.[38] The decision below announces a theory of fraudulent concealment that could eviscerate the statute of limitations in nearly all cases. It is time for this Court to address the question and define the role of fraudulent concealment in antitrust cases.

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38. Chief Justice Burger, in considering that issue as a Circuit Judge, said:

"Certainly some members of Congress thought they were accomplishing the result usually sought by the framers of statutes of limitations—the cutting off of stale claims . . . .

"I concur in our holding [that the statute of limitations can be tolled by fraudulent concealment] with considerable reservation and on the assumption that at some stage the Supreme Court must reexamine the problem and resolve it." *Westinghouse Elec. Corp. v. City of Burlington, Vermont*, 326 F.2d 691, 692-693 (D.C. Cir. 1964) (Burger, J., concurring specially).

See generally Note, *Fraudulent Concealment and Section 4(b) of the Clayton Act*, 49 U.Va.L.Rev. 276 (1963); Comment, *Clayton Act Statute of Limitations and Tolling by Fraudulent Concealment*, 72 Yale L.J. 600 (1963).

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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October 24, 1977.

Appendix

Appendix A

Decision and Opinion of the Court of Appeals

MT. HOOD STAGES, INC., dba Pacific Trailways, Plaintiff-Appellee,

v.

The GREYHOUND CORPORATION and Greyhound Lines, Inc., Defendants-Appellants.

No. 74-1282.

United States Court of Appeals, Ninth Circuit.

June 9, 1977.

Appeal from the United States District Court for the District of Oregon.

Before BROWNING and WRIGHT, Circuit Judges, and LINDBERG,* District Judge.

BROWNING, Circuit Judge:

Greyhound Corporation and Greyhound Lines, Inc., appeal from a judgment entered on a jury verdict awarding damages to Mt. Hood Stages, Inc., for injuries resulting from violations of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2.[1] We affirm.

I.

Immunity

Greyhound is the largest common carrier by bus of passengers and package express in the United States, moving more than 80 percent of this traffic in the western states and operating over

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*Honorable William J. Lindberg, Senior United States District Judge, Western District of Washington, sitting by designation.

1. The judgment was for $13,146,090 (after trebling) and attorneys' fees of $1,250,000, plus costs.

routes throughout the country. Mt. Hood is one of Greyhound's small competitors, operating over routes in Oregon, Idaho, and Utah. The essence of Mt. Hood's antitrust claim is that Greyhound acquired bus companies whose routes circled those of Mt. Hood and thereafter deprived Mt. Hood of connecting or "bridge" traffic with the purpose and effect of eliminating Mt. Hood as a substantial competitor.

Greyhound does not deny the sufficiency of the evidence to establish a violation of sections 1 and 2 of the Sherman Act, assuming that statute applies. Its principal contention is that Mt. Hood bases its claim upon acquisitions approved by the Interstate Commerce Commission and implementation by Greyhound of control over the acquired companies, and that such activities are immune from antitrust attack by virtue of section 5(11) of the Interstate Commerce Act, 49 U.S.C. § 5(11), applied in light of the Supreme Court's analysis in *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973).

Section 5(2) of the Interstate Commerce Act, 49 U.S.C. § 5(2), provides that one carrier may acquire another with Commission approval; the Commission is required to grant such approval, subject to any terms and conditions it deems reasonable, if the acquisition "will be consistent with the public interest," *id.* Section 5(11) provides that carriers participating in transactions approved by the Commission are "relieved from the operation of the antitrust laws . . . insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction."

From 1947 to 1956 Greyhound acquired eight bus companies operating in the area relevant here. Each acquisition was approved

by the Commission pursuant to section 5(2). Mt. Hood opposed four of the acquisitions. It argued that if the acquisitions were approved, Mt. Hood would be encircled and Greyhound could route traffic around it, depriving the public of the most convenient service and Mt. Hood of revenues necessary to its survival. Mt. Hood's argument to the Commission thus foreshadowed its present antitrust claim.

Greyhound responded by representing to the Commission that the acquisitions "would not adversely affect connecting carriers; that arrangements with such carriers, including interchange of traffic and open gateways, would be maintained; that it was not the policy of Greyhound to route passengers over circuitous routes; that its agents were instructed to quote the direct route as well as the Greyhound route and give passengers their choice; and that Greyhound had always carried [Mt. Hood's] schedules in its folders and cooperated in every way to acquaint the public with its service and thus promote additional traffic and business for their lines."[2] Greyhound also represented to the Commission that Greyhound would continue a joint through-bus arrangement with Mt. Hood.[3] As the Commission later found, Greyhound intended the Commission to rely upon these representations in determining whether the proposed acquisitions were in the public interest, and the Commission did in fact rely upon them in approving the acquisitions.

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2. The quotation is from the Commission's opinion in the section 5(9) proceedings, described later. *Mt. Hood Stages, Inc.*, 104 M.C.C. 449, 452 (1968).

3. This agreement, initiated in 1949, provided for a through-bus from San Francisco, California, to Spokane, Washington, using Mt. Hood's bridge route between Klamath Falls and Biggs, Oregon. Revenue and expenses were shared according to the miles traveled over each company's route. The arrangement shortened the San Francisco-Spokane trip by 110 miles and several hours as compared with the all-Greyhound route via Portland. It provided better service to travelers and was profitable for both companies.

In 1964 Mt. Hood filed a petition with the Commission pursuant to section 5(9) of the Act, 49 U.S.C. § 5(9),[4] asking it to reopen the acquisition proceedings and enter a supplemental order requiring Greyhound to live up to its representations. The allegations in Mt. Hood's petition to the Commission were essentially the same as those Mt. Hood later made in this antitrust suit—namely, that Greyhound had cancelled the through-bus connection, had scheduled connecting service so as to preclude reasonable connections with Mt. Hood, had directed Greyhound's agents and independent joint ticket agents to send traffic by longer routes around those of Mt. Hood, and had interfered in various ways with the distribution of Mr. Hood's schedules and the quotation of Mt. Hood's rates and services, all with the intent of injuring Mt. Hood. The United States intervened in support of Mt. Hood.

After an extensive evidentiary hearing, a hearing examiner resolved all issues against Greyhound and recommended entry of the order sought by Mt. Hood. In April, 1968, the Commission issued an opinion sustaining the examiner's findings that Greyhound had made the representations alleged, that Greyhound had intended the Commission to rely on them, that the Commission had relied on them in approving the acquisitions, that Greyhound had not fulfilled the representations, and that Greyhound's actions "were inspired by a desire to stifle competition" and "injure or destroy" Mt. Hood. *Mt. Hood Stages, Inc.*, 104 M.C.C. 449, 459-63 (1968). The Commission concluded that Greyhound's failure to abide by its commitment "constitutes destructive competition in contravention of the national transportation policy, is not consistent with the public interest, and provides good cause" for a supplemental order under section 5(9) of the Act. The Commission deferred

4. Section 5(9) reads:
Supplemental orders by Commission.—The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2), or (7) of this section, as it may deem necessary or appropriate.

entry of a supplemental order to allow voluntary negotiations between the parties. *Id.* at 462-63.

Two months later, in July, 1968, Mt. Hood filed this suit alleging violations of the antitrust laws and common law and statutory unfair competition. With respect to the antitrust violations the complaint alleged that, beginning in 1947 and continuing to the date of the complaint, Greyhound had restrained and monopolized commerce in the carriage of passengers and their luggage between points in Oregon, Idaho, and Utah by means essentially the same as those that were the subject of the Commission's proceeding; that is, the acquisition of independent bus lines with Commission consent obtained by the misrepresentations outlined by the Commission and thereafter engaging in the destructive competitive tactics found by the Commission. Greyhound sought, unsuccessfully, to eliminate these issues from the litigation on the ground that they fell within the exclusive jurisdiction of the Commission.

In the Commission proceedings, meanwhile, the efforts of the parties to agree upon an order failed. The Commission entered its own order requiring Greyhound to restore the practices and traffic patterns existing when the acquisitions at issue were authorized, and, specifically, to restore the joint through-bus service, to revise Greyhound's schedules to permit reasonable connections with Mt. Hood, to see that through routes and fares were quoted and quoted accurately, and to eliminate other destructive practices. *Greyhound Lines, Inc. v. United States*, 308 F.Supp. 1033, 1037 (N.D. Ill. 1970). A three-judge district court affirmed the Commission and issued its own order in similar terms. *Id.* at 1040-41. Following entry of the district court order enforcing the Commission decision, Mt. Hood amended the complaint in this antitrust proceeding to eliminate the prayer for injunctive relief.

In June, 1971, the United States and the Commission filed petitions with the district court in the enforcement proceeding, asking that Greyhound be held in contempt for failing to comply with

the court's order enforcing the Commission's decision. The court found Greyhound had willfully failed to comply with portions of the order and held Greyhound in criminal and civil contempt. *United States v. Greyhound Corp.*, 363 F.Supp. 525 (N.D.Ill. 1973). The court imposed fines totaling $600,000, *United States v. Greyhound Corp.*, 370 F.Supp. 881, 883-85 (N.D.Ill.1974), ordered Greyhound to file semiannual reports of compliance efforts for five years, and granted members of the Department of Justice staff "visitorial and document examination rights so that they may further monitor Greyhound's compliance efforts," *id.* at 886. Because Greyhound appeared to be attempting to comply fully, no further injunctive relief was ordered.

While the proceeding to enforce the Commission's order was in progress, this antitrust case had come to trial and concluded with the verdict in Mt. Hood's favor. The opinion of the court in the enforcement proceeding noted that "many of Greyhound's actions that were found to be in violation of the order, were also found to be in violation of the antitrust laws" in this private suit. *Id.* at 884 n. 2. The enforcement court denied Mt. Hood's prayer for damages for expenses related to the contempt action and for injury to its business as a result of the contempt, on the ground that the damages awarded in this antitrust proceeding "will adequately compensate [Mt. Hood] for any damages it may have also suffered as a result of Greyhound's contempt. This is particularly true since many of the same acts of Greyhound that were found to be contemptuous were also involved in the private antitrust case." *Id.* at 888. The court of appeals affirmed the criminal contempt convictions, stating, "the record of this case shows a flagrant disregard of a court order" that was intended "to insure that Greyhound would comply with representations it made at the acquisition hearings and cease its predatory practices toward Mt. Hood." *United States v. Greyhound Corp.*, 508 F.2d 529, 540-41 (7th Cir. 1974).

From this recital it is evident that the conduct underlying the regulatory proceedings and that underlying the antitrust suit are essentially the same. The Commission's authority to regulate this conduct is not challenged.

Whether conduct Congress has made subject to administrative regulation is exempt from the antitrust laws depends upon Congress' intent. No direct evidence of a congressional intent relevant here has been cited.[5] The only applicable statutory language dealing with the question of antitrust immunity is that found in section 5(11), quoted above. The conduct charged in this action is not within the express exemption afforded by sections 5(11), particularly because provisions of this kind are strictly construed.[6] Since the Commission approved the acquisition in reliance upon Greyhound's commitment that the conduct underlying the antitrust complaint would not occur if the acquisitions were approved, it can hardly be argued that antitrust immunity for such conduct is "necessary" to enable Greyhound "to carry into effect the transaction so approved . . . and to hold, maintain, and operate any properties and exercise any control . . . acquired through such transaction."

The inclusion of this express exemption in the statute implies a congressional intention that conduct not within the exemption remains subject to the antitrust laws.[7] But this conclusion does not always follow; despite a grant of express immunity that does not

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5. The subject of antitrust immunity was touched upon briefly during the House debates. 58 Cong.Rec. 8593-94 (1919). The scope of the immunity was not discussed. Representative Sanders assured other House members that the antitrust laws were not being "wiped out"—that a merger will only be allowed if it would benefit the public. *Id.*

6. *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 733, 93 S.Ct. 1773, 36 L.Ed.2d 620 (1973); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 316, 76 S.Ct. 937, 100 L.Ed. 1209 (1956).

7. *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 216-17, 86 S.Ct. 781, 15 L.Ed.2d 709 (1966); *United States v. Borden Co.*, 308 U.S. 188, 201, 60 S.Ct. 182, 84 L.Ed. 181 (1939).

cover the conduct charged, antitrust immunity may still be implied.[8]

Because of the "fundamental national policies embodied in the antitrust laws," *Otter Tail Power Co. v. United States,* 410 U.S. 366, 374, 93 S.Ct. 1022, 1028, 35 L.Ed.2d 359 (1973), however, repeal of those laws is not lightly implied from congressional adoption of a regulatory scheme.[9] Conduct is not immunized merely because it falls within the jurisdiction of the regulatory agency,[10] as it did in this case. Immunity is not implied merely because the applicable regulatory standard requires the agency to give weight to antitrust policy,[11] as it did in this instance.[12]

8. *See International Tel. & Tel. Corp. v. General Tel. & Elec. Corp.,* 518 F.2d 913, 918-19 & n. 24 (9th Cir. 1975). *Hughes Tool Co. v. Trans World Airlines, Inc.,* 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973), the decision relied upon most heavily by Greyhound, involved an express exclusion, and it is not entirely clear that the conduct that case held to be immunized from the antitrust laws was within the express exclusion, narrowly construed. The Court suggested as much when it noted, "a statutory scheme that does not create a total exception from antitrust laws may, nonetheless, in particular and discrete instances *by implication* grant immunity from an antitrust claim." *Id.* at 385 n. 14, 93 S.Ct. at 660 (emphasis added). The Supreme Court has twice cited *Hughes Tool* as a case in which immunity was implied. *See Gordon v. New York Stock Exch., Inc.,* 422 U.S. 659, 682, 95 S.Ct. 2598, 45 L.Ed. 2d 463 (1975); *United States v. National Ass'n of Sec. Dealers, Inc.,* 422 U.S. 694, 734-35, 95 S.Ct. 2427, 45 L.Ed.2d 486 (1975).

9. *United States v. National Ass'n of Sec. Dealers, Inc.,* 422 U.S. 694, 719-20, 95 S.Ct. 2427, 45 L.Ed.2d 486 (1975); *United States v. Philadelphia Nat'l Bank,* 374 U.S. 321, 350-51, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963).

10. *Cantor v. Detroit Edison Co.,* 428 U.S. 579, 596-97 n. 36, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976); *Gordon v. New York Stock Exch., Inc.,* 422 U.S. 659, 692, 95 S.Ct. 2598, 45 L.Ed.2d 463 (1975) (Stewart, J., concurring); *Otter Tail Power Co. v. United States,* 410 U.S. 366, 372, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973).

11. *Gulf States Util. Co. v. Federal Power Comm'n,* 411 U.S. 747, 758-60, 93 S.Ct. 1870, 36 L.Ed.2d 635 (1973); *Otter Tail Power Co. v. United States,* 410 U.S. 366, 373, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973).

12. *Port of Portland v. United States,* 408 U.S. 811, 841, 92 S.Ct. 2513, 33 L.Ed.2d 723 (1972); *Northern Lines Merger Cases,* 396 U.S. 491, 511-16, 90 S.Ct. 708, 24 L.Ed.2d 700 (1970); *McLean Trucking Co. v. United States,* 321 U.S. 67, 83-87, 64 S.Ct. 370, 88 L.Ed. 544 (1944).

The applicable interpretative standard was restated by the Supreme Court in *Cantor v. Detroit Edison Co.,* 428 U.S. 579, 597, 96 S.Ct. 3110, 3120, 49 L.Ed.2d 1141 (1976): "The Court has consistently refused to find that regulation gave rise to an implied exemption without first determining that exemption was necessary in order to make the regulatory act work, 'and even then only to the minimum extent necessary.' "[13] As the Court had written in the preceding term, "Certain axioms of construction are now clearly established. Repeal of the antitrust laws by implication is not favored and not casually to be allowed. Only where there is a 'plain repugnancy between the antitrust and regulatory provisions' will repeal be implied." *Gordon v. New York Stock Exchange, Inc.,* 422 U.S. 659, 682, 95 S.Ct. 2598, 2611, 45 L.Ed.2d 463 (1975).[14]

Applying these standards, we find no reason to imply immunity here. No "plain repugnancy" exists between the Interstate Commerce Act and the Sherman Act as applied to Greyhound's conduct, and it is not necessary to exempt Greyhound's conduct from antitrust restraints "to make the [Interstate Commerce Act] work." This is evident from the course taken in the administrative and judicial proceedings under both statutes. Clearly there has been no conflict between the regulatory and antitrust regimes. On the contrary, they have accommodated and supplemented each other. The policies of both have been advanced. There has been initial resort to the Commission for an application of its expertise to the factual issues relevant to whether application of the anti-

13. *Quoting Silver v. New York Stock Exch.,* 373 U.S. 341, 357, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963).

14. *Quoting United States v. Philadelphia Nat'l Bank,* 374 U.S. 321, 350-51, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963). *See International Tel. & Tel. Corp. v. General Tel. & Elec. Corp.,* 518 F.2d 913, 918-19 (9th Cir. 1975).

trust laws would be incompatible with regulatory objectives, *see Ricci v. Chicago Mercantile Exchange,* 409 U.S. 289, 93 S.Ct. 573, 34 L.Ed.2d 525 (1973), and the Commission has unqualifiedly indicated that it has not approved and continues to disapprove Greyhound's conduct under regulatory standards applied in the light of antitrust principles. *See Mt. Hood Stages, Inc.,* 104 M.C.C. 449, 458, 460-63 (1968) (citing *Marnell v. United Parcel Service of America, Inc.,* 260 F.Supp. 391 (N.D.Cal.1966)).

The remedies afforded under the two statutes have also meshed. The injunction issued in enforcement of the regulatory determination was not duplicated in the antitrust proceeding. In assessing the penalty for contempt for violation of that injunction, the court was careful to avoid the possibility of double damages. *See United States v. Greyhound Corp., supra,* 370 F.Supp. at 888. The losses sustained by Mt. Hood during the contempt period (approximately February 5, 1970, to March 15, 1973, see *id.* at 884 n.2) were only a small part of the total damages Mt. Hood sustained from the inception of Greyhound's wrongful conduct in 1947. The remaining damages could be and were recovered only in the antitrust action. Trebling the damages—an effective support for the competitive policy reflected in both statutes—could be and was accomplished only in the antitrust proceeding. Since the transactions involved offended the policies of both statutes and those policies were advanced and not impaired by the application of both statutes, it is reasonable to assume Congress would have intended both to apply.

Greyhound leans heavily upon *Hughes Tool Co. v. Trans World Airlines, Inc.,* 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973). From this decision Greyhound draws the general principle that when antitrust immunity is conferred by a statute upon participants in an acquisition approved by a regulatory agency, the immunity extends to conduct made possible by the acquisition whether or not the conduct itself was approved, at least where the agency considered the possibility such conduct might occur and retained continuing jurisdiction to regulate it in the public interest.

But antitrust exemption is implied "*only* to the *minimum* extent necessary" to make the regulatory scheme work (emphasis added). Quoting this principle, and citing *Hughes Tool* and *Pan American World Airways, Inc. v. United States,* 371 U.S. 296, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963), the Supreme Court recently wrote, "[W]e have implied immunity *in particular and discrete instances* to assure that the federal agency entrusted with regulation in the public interest could carry out that responsibility free from the disruption of conflicting judgments that might be voiced by courts exercising jurisdiction under the antitrust laws." *United States v. National Association of Securities Dealers, Inc.,* 422 U.S. 694, 734-35, 95 S.Ct. 2427, 2450, 45 L.Ed.2d 486 (1975) (emphasis added).

Greyhound's generalization may accommodate the facts of both *Hughes Tool* and the present case, but it omits the distinguishing particulars that made antitrust immunity appropriate in *Hughes Tool* and would make it inappropriate here. The crux of the distinction between the two cases is that, as the Supreme Court viewed the record in *Hughes Tool,* the regulatory agency involved had considered the type of conduct which underlay the antitrust complaint and had approved it as in the public interest;[15] a successful antitrust suit therefore necessarily would have been repugnant to operation of the regulatory scheme. The opposite is true in this case; the Interstate Commerce Commission did not contemplate Greyhound's challenged conduct as likely to occur and thus did not approve such conduct when it approved the acquisitions.[16] The Commission also subsequently disapproved that conduct.

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15. *See In re REA Express, Inc.,* 412 F.Supp. 1239, 1261 (E.D.Pa. 1976); *Air Freight Haulage Co. v. Ryd-Air, Inc.,* 408 F.Supp. 446 (S.D.N.Y. 1976).

16. *See Scroggins v. Air Cargo, Inc.,* 534 F.2d 1124, 1131 (5th Cir. 1976).

In *Hughes Tool* the Civil Aeronautics Board issued orders approving acquisition of control of TWA by Hughes Tool Co. The applicable statute relieved persons affected by such an order from operation of the antitrust laws so far as necessary "to do anything authorized, approved or required by such order." Section 414, Federal Aviation Act, 49 U.S.C. § 1384. The agency-authorized control later ended, and an antitrust suit was brought by TWA against Hughes Tool Co. based upon transactions between the two during the period of Hughes Tool Co.'s control. The antitrust complaint alleged, in effect, that the controlling company had exercised its control to dictate the completion of the transactions in a way that injured the controlled company.

Hughes Tool Co.'s control of TWA was acquired in two steps —an initial acquisition of 45.6 percent of TWA's stock, and a later acquisition increasing Hughes Tool Co.'s holdings to 80 percent. Both acquisitions were approved by the Board. In hearings relating to the second acquisition the Board examined the manner in which Hughes Tool Co. had exercised its *de facto* control over TWA in the earlier period, particularly with respect to the acquisition of new flight equipment, which was the subject matter of the transactions on which the antitrust suit was based. The Board conceded allegations of abuse of the kind alleged in the antitrust complaint. Nonetheless, the Board concluded that continuation and enhancement of Hughes Tool Co.'s control was in the public interest. Moreover, the Board's order required that all substantial sales transactions between the two companies be submitted to the Board for approval, and, pursuant to this requirement, the transactions upon which the antitrust complaint rested were submitted to the Board and approved as in the public interest.

The Supreme Court noted that the subject matter of the Board's approval had been the acquisition and exercise by Hughes Tool Co. of control over the same kind of transactions as those at issue. *Hughes Tool, supra*, 409 U.S. at 386, 93 S.Ct. 647. By its approval

the Board had determined that such control was in the public interest and consistent with the regulatory statute's prohibitions against monopoly and restraining competition. Sections 102(c) and 408(b), Federal Aviation Act, 49 U.S.C. §§ 1302(c) and 1378(b).[17] The Court further noted that the Board had also approved the very transactions underlying the antitrust suit as meeting the same standard. 409 U.S. at 379, 387, 93 S.Ct. 647.

An antitrust suit challenging these transactions, the Court said, would seek "to negate what the Board, after full investigation, had found consistent with § 408's anti-monopoly provision, consistent with § 102's competition standard, and consistent with the public interest." *Id.* at 388, 93 S.Ct. at 661. TWA's antitrust suit sought "to terminate a relationship the continuation of which the Board had found essential to both TWA and the public interest and to penalize the type of conduct which the Board expressly contemplated and preferred would continue unless and until a different order from the Board was forthcoming." *Id.*[18] The Court concluded that the transactions were exempt from suit under the Sherman Act.[19]

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17. Acquisition of control of one company by another necessarily contemplates exercise by the parent of control over the internal business operations of the subsidiary. When the agency has approved acquisition of control, exclusive agency jurisdiction over its exercise is more readily implied. *See Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 385-86, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973), *citing Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963), as such a case.

18. *See also Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 309, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963).

19. The Court summarized its holding in almost identical language at two points in the opinion:

At pages 387-88, 93 S.Ct. at page 661, the Court said:

> We repeat, however, what we said in the *Pan American* case that the Federal Aviation Act does not completely displace the antitrust laws. . . . But where, as here, the CAB authorizes control of an air carrier to be acquired by another person or corporation, and where it specifically authorizes as in the public interest specific transactions between the parent and the subsidiary, the way in

In sum, in *Hughes Tool,* the propriety under the regulatory statute of the activity challenged in the antitrust suit (control by Hughes Tool Co. of the manner in which its TWA subsidiary acquired new aircraft) was the central issue presented to the agency for consideration in the exercise of its regulatory authority, and the agency had resolved the issue by approving such control as in the public interest. Exemption from the antitrust laws was implied because a successful application of the antitrust laws to the conduct would have negated the regulatory agency's determination and faced the regulated carrier with inconsistent governmental commands. In the present case, as has been seen, the premise of inconsistent regulatory and antitrust demands is absent. Also unlike *Hughes Tool,* the instant suit is not brought by a subsidiary against its parent and does not challenge the effect on the

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which that control is exercised in those precise situations is under the surveillance of the CAB, not in the hands of those who can invoke the sanctions of the antitrust laws. As noted, the parent company which controls an air carrier is subject to pervasive control by the CAB. The control which the CAB is authorized to grant or to deny under § 408 involves an appraisal of the impact of that control in terms of monopoly and competition; and the ongoing supervision entrusted to the CAB by § 415 is broad enough to put all transactions between parent and subsidiary—as originally conceived or subsequently exercised—under CAB supervision.

And again at page 389, 93 S.Ct. at page 661-662:

> We by no means hold that the Federal Aviation Act completely displaces the antitrust laws. *Pan American,* 371 U.S., at 305, [83 S.Ct. at 482]. But where, as here, the CAB authorizes control of an air carrier to be acquired by another person or corporation, and where the CAB specifically authorizes as in the public interest specific transactions between the parent and the subsidiary, the way in which that control is exercised in those precise situations is under the surveillance of the CAB, not in the hands of those who can invoke the sanctions of the antitrust laws. The control which the CAB is authorized to grant or to deny under § 408 involves an appraisal of the impact of that control in terms of monopoly and competition; and the ongoing supervision entrusted to the CAB by § 415 is broad enough to put all transactions between parent and subsidiary—as originally conceived or subsequently exercised—under CAB supervision.

acquired company of the daily intercompany control that was integral to the acquisition. *See also Pan American World Airways v. United States,* 371 U.S. 296, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963). Rather, the instant suit is brought by a third party to the approved acquisitions, challenging conduct with regard to the third party that not only was not integral to the Commission's acquisition approvals but was violative of specific representations made by Greyhound at the acquisition hearings. In these circumstances, Greyhound's conduct is not immune from antitrust strictures.

II.

Jury Instructions and Admission of Evidence

Many of Greyhound's assertions of error in evidentiary rulings and instructions rest upon Greyhound's theory of antitrust immunity and fall with it.

Greyhound complains of the district court's "failure to instruct on Section 5(11)." It is not clear precisely what Greyhound has in mind. The extent to which Greyhound's conduct was exempt from the antitrust laws by the Interstate Commerce Act was a legal question, not an issue of fact for the jury.[20] The instructions proposed by Greyhound were properly rejected for this reason and because they reflected Greyhound's uncompromising position that the acquisitions approved by the Commission and all conduct involving exercise of control over the acquired carriers were exempt from the antitrust laws and were not to be considered by the jury for any purpose whatever.[21]

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20. *See Gordon v. New York Stock Exch., Inc.,* 422 U.S. 659, 688, 95 S.Ct. 2598, 45 L.Ed.2d 463 (1975).

21. For example, Greyhound requested an instruction that since the Commission had approved the acquisitions, "the manner in which defendants have used or exercised the control of these carriers" was within the exclusive jurisdiction of the Commission, and therefore the jury "must exclude from [its] consideration all conduct by defendants involving exercise of control over the acquired bus companies." Greyhound also requested instructions referring to the specific conduct the Commission

The court was required to provide the jury with standards to apply in determining whether Greyhound was liable under the antitrust laws, and it did so. The court defined the elements of monopolization, attempt to monopolize and unreasonable restraint of trade in the usual way, and Greyhound does not object to these instructions in themselves. The court also told the jury that the fact that Greyhound was regulated affected what activities of Greyhound were subject to the antitrust laws; that in a regulated industry the existence of monopoly power was not evidence of monopolization, but "use of monopoly power even if lawfully acquired, to foreclose or restrain competition, to gain a competitive advantage or to eliminate a competitor" was such evidence.[22] Under these instructions the jury could not base a finding of monopolization on the approved acquisitions themselves; improper use of the acquired power was required. This was at least as favorable to Greyhound as the law warranted.

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had condemned, and telling the jury that regulation of such conduct was within the exclusive jurisdiction of the Commission and could not be the basis of any findings by the jury.

In addition, Greyhound requested an instruction essentially in the words of the statute, telling the jury that the antitrust laws did not apply to the approved acquisitions "or to anything done by defendants which was necessary to hold, maintain or operate the properties or operating rights obtained in these approved transactions." Since the scope of the immunity conferred by the statute was a legal question for the court to decide, this instruction was properly refused. *See* note 20, *supra,* and related text. The court's decision as to the scope of the statutory immunity shaped and conditioned the court's instructions spelling out what facts the jury must find before Greyhound could be held liable.

22. The quoted portion of the instruction is settled law. *See Otter Tail Power Co. v. United States,* 410 U.S. 366, 377, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973); *United States v. Griffith,* 334 U.S. 100, 107, 68 S.Ct. 941, 92 L.Ed. 1236 (1948). Indeed, section 2 is violated if exclusionary tactics are used to maintain a lawfully acquired monopoly. *Industrial Building Materials, Inc. v. Interchemical Corp.,* 437 F.2d 1336, 1344-45 (9th Cir. 1970), *interpreting United States v. United Shoe Machinery Corp.,* 110 F.Supp. 295, 343 (D.Mass. 1953), *aff'd per curiam,* 347 U.S. 521, 74 S.Ct. 699, 98 L.Ed. 910 (1954). *See also TV Signal Co. v. American Tel. & Tel. Co.,* 462 F.2d 1256, 1261 (8th Cir. 1972).

Greyhound objects to the admission of evidence regarding the administrative and related court proceedings, and to jury instructions that this evidence could be considered "in determining the issue of Greyhound's motive, intent and purpose and reasonableness of its behavior." Greyhound objects on several grounds, but primarily on the basis of Greyhound's immunity argument, which we have rejected. Greyhound's other objections are also without merit.[23] The evidence was properly used for the purpose stated by the court.

The lengthy instructions contained two brief passages apparently inspired by *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.,* 382 U.S. 172, 177, 86 S.Ct. 347, 15 L.Ed.2d 247 (1965), and *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972). Greyhound argues that these passages permitted imposition of liability if the jury found no more than that Greyhound had perpetrated a fraud on the Commission or had acted in bad faith in the administrative and related judicial processes, rendering those processes ineffective. Even considered alone, however, both passages also required the jury to find, as a condition of liability, that the fraud or abuse of process resulted in an administrative order that conferred a monopoly or an unreasonable competitive

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23. One of these additional grounds of objection warrants brief comment. Greyhound argues that the instructions permitting use of evidence of the administrative proceedings in determining Greyhound's intent and the reasonableness of its conduct "infringe" Greyhound's constitutional privilege to seek relief before administrative agencies, *citing Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961). But "[i]t is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute." *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 514, 92 S.Ct. 609, 613, 30 L.Ed.2d 642 (1972). The antitrust laws have been applied in many factual contexts that included utilization of administrative processes by the antitrust violator. *See, e.g., Otter Tail Power Co. v. United States,* 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973); *Aloha Airlines, Inc. v. Hawaiian Airlines, Inc.,* 489 F.2d 293 (9th Cir. 1973).

advantage upon Greyhound. At most, therefore, the only question raised by these passages is whether the doctrine of *Walker Process* applies outside the patent field.

When the passages are read in light of the parties' contentions, the evidence in the case, and the instructions as a whole, however, we do not believe they present even this issue. Mt. Hood did not contend that the acquisitions themselves or the power Greyhound gained through them, standing alone, constituted a violation of the antitrust laws. Mt. Hood relied instead upon Greyhound's exclusionary practices made possible by the acquisitions. The instructions were generally to the same effect. The jury was not instructed on any theory that Greyhound's purchase of other carriers might constitute the unlawful acquisition of monopoly power. On the contrary, as we have seen, the jury was told that in such a regulated industry the mere possesion of monopoly power did not violate the Sherman Act, and that abuse of monopoly power to eliminate competition was required. The only fraud or abuse of process presented by the evidence was that Greyhound represented to the Commission that it was not using and would not use any of the acquired routes to engage in the predatory practices we have outlined earlier, and that Greyhound nonetheless did so. Since these same predatory practices underlay Mt. Hood's antitrust claim, since the instructions also conditioned liability upon a finding of monopolization or unreasonable restraint of competition defined in the usual way, and since the judge properly ruled without submitting the issue to the jury that Greyhound's challenged conduct was not immunized from antitrust attack, the passages amounted to no more than a reiteration in another form of the general instruction that unreasonable restraint of competition or use by Greyhound of monopoly power to foreclose or restrain competition would violate the antitrust laws.[24]

24. Thus even if appellant was entitled to an instruction that "fraud" must be proven by "clear and convincing" evidence, as Greyhound urges, failure to give it was harmless under Fed.R.Civ.P. 61.

Greyhound attacks the use made at trial of two antitrust consent decrees entered into by Greyhound and the United States. The decrees, which were admitted in evidence, prohibited Greyhound from refusing to establish through-routes with competitors and from continuing other practices the same as or similar to those charged in this suit. The jury was told it could consider the decrees and Greyhound's conduct with respect to obeying or disobeying them in determining the issues of Greyhound's intent and purpose and the reasonableness of Greyhound's behavior.

A trial judge must be accorded "wide latitude" in determining the relevance of evidence in antitrust cases. *Gray v. Shell Oil Co.*, 469 F.2d 742, 751 (9th Cir. 1972). The admissibility of a consent decree is a matter committed to the court's discretion. See *Control Data Corp. v. IBM Corp.*, 421 F.2d 323, 326 (8th Cir. 1970). *See also Vitagraph, Inc. v. Perelman*, 95 F.2d 142, 146 (3d Cir. 1938). There was no abuse of discretion here. The court warned the jury of the limitations implicit in decrees entered into by consent, and confined their use to a proper purpose.

Greyhound's claim that the jury should not have been asked to determine whether Greyhound had a dominant share of the market because Greyhound's market share resulted from ICC-approved transactions is but another reflection of Greyhound's rejected theory of immunity.

Other objections to the instructions regarding the relevant market are without merit. While it is true that the court did not refer to the "interchangeability of services" in those terms, the court accomplished the same purpose by use of illustrations and by instructing the jury that a "relevant" market must be one for a "distinct service" with "peculiar characteristics," serving "distinctive purposes," with "dissimilar" price characteristics, and relatively "insensitive to price variations," so that an increase in bus fares would not result in large numbers of customers switching to other forms of intercity transportation. If these indices of distinctness were not found, the jury was told, intercity bus trans-

portation would not constitute a relevant market for antitrust purposes.[25]

III.

Statute of Limitations

The jury awarded Mt. Hood damages for injuries sustained from 1953 to 1973. The applicable statute of limitations, 15 U.S.C. § 15b, bars all claims on which suit is not commenced within four years after they accrue—in this case, all claims that accrued before July 5, 1964, since Mt. Hood's suit was filed on July 5, 1968. However, Mt. Hood asserts that the running of the limitations period was suspended from 1953 to 1960 by Greyhound's fraudulent concealment of its wrongdoing, and from 1964 to the date of suit by the intervention and participation of the United States in the section 5(9) proceedings brought by Mt. Hood before the Commission.[26]

In accordance with the universal rule, our circuit holds that fraudulent concealment of the existence of an antitrust cause of action tolls the four-year statute of limitations provided by section 15b.[27] The jury found Greyhound had fraudulently con-

25. Greyhound contends the jury was instructed as to several contentions for which there was no evidentiary support. We have examined the record with respect to each of these issues and conclude that either there was sufficient evidence to justify an instruction or the instruction was harmless under Fed.R.Civ.P. 61.

26. *See* note 4, *supra*, and related text. The period of fraudulent concealment and the government intervention tolling period can be "tacked" or "bridged" to suspend the statute for the entire period since the time between the two did not exceed four years, albeit short by only a day. *See, e.g. City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 460-61 (2d Cir. 1974); *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561, 567-72 (10th Cir. 1962); *Maricopa County v. American Pipe & Constr. Co.*, 303 F.Supp. 77, 84-86 (D.Ariz.1969), *aff'd*, 431 F.2d 1145 (9th Cir. 1970).

27. *Westinghouse Elec. Corp. v. Pacific Gas & Elec. Co.*, 326 F.2d 575 (9th Cir. 1964); accord. *Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp.*, 546 F.2d 570 (4th Cir. 1976); *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389 (6th Cir. 1975); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974); *Crummer Co. v. Du Pont*, 255 F.2d 425 (5th Cir. 1958).

cealed its antitrust violations from 1953 to December 14, 1960, and that Mt. Hood neither knew nor should have known of these violations prior to December 14, 1960.

Greyhound does not deny the sufficiency of the evidence to show it attempted to conceal its conduct. It argues, however, that Mt. Hood had notice of Greyhound's activities long before December 14, 1960.

The record shows that Mt. Hood complained about quoting and routing practices of Greyhound agents on various occasions during the 1953-1960 period. The record also shows, however, that Greyhound continuously represented to Mt. Hood and to the Commission that these were isolated incidents not countenanced by Greyhound's management.[28]

The record shows that Mt. Hood suspected Greyhound of unlawful conduct prior to December 14, 1960, but "[s]uspicion will not substitute for knowledge of facts from which fraud could reasonably be inferred." *Friedman v. Meyers*, 482 F.2d 435, 439 (2d Cir. 1973).

There was evidence that Mt. Hood's president expressed concern over Greyhound's expansion by acquiring other carriers, and that he also stated his belief that the consent decrees were being violated. Awareness of Greyhound's growing dominance of the market was not equivalent to notice of monopolization, however, for the acquisitions were approved by the Commission and presumably immunized from the antitrust laws. Nor was knowledge

28. Greyhound argues that such representations, denials, and other attempts at concealment are immaterial citing such cases as *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F.2d 742, 752 (9th Cir. 1936); *Feak v. Marion Steam Shovel Co.*, 84 F.2d 670, 673 (9th Cir. 1936). But as these cases demonstrate, attempts at concealment lose their relevance only when they occur after plaintiff already knew or should have known of the unlawful conduct. In the present case the jury weighed the evidence and concluded that, in part because of Greyhound's attempts at concealment, Mt. Hood neither knew or should have known of Greyhound's antitrust violation.

of violations of the consent decrees equivalent to such notice, for, as Greyhound itself is careful to point out, violations of consent decrees are not in themselves violations of the antitrust laws.

Greyhound asserts that Mt. Hood was charged with the duty to investigate once it became aware of facts from which antitrust violations should reasonably have been inferred.[29] But in the face of Greyhound's assurances and denials of responsibility, we cannot say as a matter of law that Mt. Hood's awareness of the growth of Greyhound's power through acquisitions and of the commission of predatory acts by some of Greyhound's agents amounted to notice of potential antitrust claims against Greyhound.

We conclude, therefore, that the trial court properly refused to set aside the jury's determination that Greyhound fraudulently concealed its antitrust violation, and that Mt. Hood had neither actual nor constructive knowledge of the violation until December 14, 1960.

Four years later, on December 14, 1964, one day before Mt. Hood's antitrust claim would have been barred, the United States intervened in the section 5(9) proceedings Mt. Hood had instituted before the Commission in October, 1964. The trial court held that, under the provisions of 15 U.S.C. § 16(i), the intervention and the subsequent participation by the United States in the Commission proceedings tolled the running of the statute of limitations until those proceedings terminated in 1974, well after the filing of the present suit.

Section 16(i) provides that running of the limitations period on a private cause of action is suspended during the pendency of "any civil or criminal proceeding . . . instituted by the United States to prevent, restrain, or punish violations of any of the antitrust

29. *See* note 28, *supra*, and cases cited therein.

laws."[30] Greyhound argues that section 16(i) is inapplicable because the administrative proceedings were not "instituted by the United States" and because they were not proceeding "to prevent, restrain, or punish violations of any of the antitrust laws."

The literal wording of section 16(i) is not controlling. Where one possible interpretation of the language would effect the congressional purpose and another defeat it, the former is to be adopted. *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 321, 85 S.Ct. 1473, 14 L.Ed.2d 405 (1965). The clearly expressed purpose of section 16(i) is to further effective enforcement of the antitrust laws by permitting private litigants to have the benefits that may flow from governmental antitrust enforcement efforts. *Id.* at 320, 85 S.Ct. 1473. This purpose would be served by interpreting section 16(i) to encompass the government's intervention and participation in the section 5(9) proceedings before the Commission—a reading the language readily permits.

The proceedings were of a kind likely to produce benefits to Mt. Hood as a plaintiff in a subsequent antitrust suit.[31] The issues,

30. 15 U.S.C. § 16(i) reads in part:

> Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws . . . the running of the statute of limitations in respect of every private or State right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however*, That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 or 15c of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

31. The question is not whether the government proceedings actually conferred benefits upon the private antitrust plaintiff, but whether the character of the proceedings was such that they were likely to do so. Thus in analyzing the issue the Supreme Court spoke of government action which "may aid the private litigant." *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 319, 85 S.Ct. 1473, 14 L.Ed.2d 405 (1965). If actual benefit were the test, it

as we have seen, were largely the same. Governmental investigative and legal resources were made available to fully develop the facts and the law favorable to the common position of the government and Mt. Hood on these issues. The successful resolution of these issues was critical to the defeat of Greyhound's claim of antitrust immunity.

It would make form controlling to hold section 16(i) inapplicable merely because Mt. Hood rather than the United States instituted the proceedings. The United States intervened little more than 60 days after the filing of Mt. Hood's petition and participated actively in all subsequent stages of proceedings that required nearly a decade to complete. Nothing would be gained, and a good deal of judicial and administrative time and efficiency would be lost, if the United States were compelled to institute a separate independent proceeding in district court under 15 U.S.C. § 26 to assure private treble damage litigants the benefits Congress intended they should have from the government's action. As the trial court concluded, "the Congressional intent behind [16(i)] is better served by treating intervention by Antitrust Division lawyers as the functional equivalent of a direct action by them."

In addition to relying on the language of the statute, Greyhound argues that section 16(i) applies only when the United States initiates rather than intervenes in a proceeding because of the Supreme Court's statement in *Minnesota Mining* that the purpose of section 16(i) is to permit private parties the benefit of *"prior government actions."* 381 U.S. at 320, 85 S.Ct. 1473 (emphasis by Greyhound). Obviously, the Court was referring only to actions occurring before the antitrust suit was commenced. Greyhound's argument epitomizes the kind of "grudging interpretation" which "would collide head-on with Congress' basic policy objectives." *Id.*

might be impossible to determine whether the government proceedings would toll the running of limitations until those proceedings were finally concluded. Private plaintiffs would be compelled to file their antitrust suits although government proceedings involving the same subject matter were still in progress.

When the substance of the government's intervention and participation before the Commission is examined, it falls fairly within the class of proceedings "to prevent, restrain, or punish violations of any of the antitrust laws" to which section 16(i) applies. It is not controlling that the government's action was taken in an administrative rather than judicial setting, *Minnesota Mining, supra,* 381 U.S. at 320, 85 S.Ct. 1473, nor that the proceedings were not brought under the antitrust laws, *Luria Steel & Trading Corp. v. Ogden Corp.,* 484 F.2d 1016, 1020-21 (3d Cir. 1973); *Rader v. Balfour,* 440 F.2d 469, 473 (7th Cir. 1971). The government action suspends the running of the limitation period under section 16(i) if it "is directed at alleged conduct which appears to involve an existing or incipient violation of the antitrust laws," *Rader v. Balfour, supra,* 440 F.2d at 473, for it is government participation in such a proceeding that is likely to produce the benefits that Congress intended plaintiffs in later private treble damage actions to have.

The government's petition to intervene demonstrates that its interest lay in the possibility of antitrust violations should Mt. Hood's allegations prove correct. To explain its interest in the proceedings and its desire to participate as a party, the government stated:

> The allegations of the petition of Mt. Hood Stages, Inc. make a serious charge: that Greyhound has been permitted through the series of acquisitions the Commission approved in these proceedings to extend its system in all directions around Mt. Hood; that Greyhound has now begun to route around Mt. Hood over all Greyhound's routes traffic which it used to interchange with Mt. Hood or handle in through buses over shorter and quicker routes and to engage in numerous other acts and practices which as they are described in Mt. Hood's petition (pp. 8-9) have in the aggregate the appearance of a studied effort to force Mt. Hood out of business. . . .

The petition noted Mt. Hood's increasing vulnerability to and dependence on Greyhound. It referred to Greyhound's "predatory conduct" and to the possibility of Mt. Hood's "extinction at the hands of an infinitely more powerful rival." The petition concluded:

> Behind the immediate issues before the Commission are further issues of applicability of the antitrust laws. The Commission's approvals of the acquisitions relieved Greyhound and its officials from accountability under these laws only to the extent necessary to put the acquisitions into effect. While actions taken to give effect to the acquisitions are completely immune, exercise of economic power the acquisitions conferred so as to isolate and destroy a competitor is not.

As Greyhound itself admitted before the district court in its motion to dismiss the complaint, a purpose of the Justice Department's intervention was "to assure the adequate consideration of antitrust issues."

Antitrust issues were an appropriate part of the proceedings. The Commission was required to consider the anticompetitive effects of the section 5(2) transactions in framing, and modifying, its order.[32] Early in the proceedings Greyhound was reminded "that the antitrust laws and the national transportation policy . . . offer certain broad guidelines to be kept in mind in determining this proceeding." *Mt. Hood Stages, Inc., supra*, 104 M.C.C. at 451. The Commission rested its decision upon the conclusion that Greyhound's conduct "constitutes destructive competition in contravention of the national transportation policy." *Id.* at 463.[33] In sustaining the Commission's order the district court wrote:

32. *Port of Portland v. United States*, 408 U.S. 811, 841, 92 S.Ct. 2513, 33 L.Ed.2d 723 (1972); *Northern Lines Merger Cases*, 396 U.S. 491, 511-16, 90 S.Ct. 708, 24 L.Ed.2d 700 (1970); *McLean Trucking Co. v. United States*, 321 U.S. 67, 83-87, 64 S.Ct. 370, 88 L.Ed. 544 (1944).

33. The Commission rejected Greyhound's argument that Greyhound's practices were not in themselves unlawful on the basis of the antitrust principle that "actions which are not in themselves unlawful may be unlawful when they are part of a plan to monopolize or restrain commerce." *Mt. Hood Stages, Inc.*, 104 M.C.C. 449, 458 (1968). The Commission cited the Sherman Act case of *Marnell v. United Parcel Service of America, Inc.*, 260 F.Supp. 391 (N.D.Cal.1966).

> It is inconceivable to us that Congress intended that destructive practices made possible by acquisition approvals may not be corrected by supplemental order under Section 5(9), especially in light of the ICC's duty to take the antitrust policy of the United States into account in its decision making.

Greyhound Lines, Inc. v. United States, supra, 308 F.Supp. at 1038.

Because Congress' purpose in enacting section 16(i) will be served by this interpretation, and because the language of the section does not bar it, we conclude that the government's intervention in the section 5(9) proceedings on December 14, 1964, tolled the running of the limitations period from that date.[34] Accordingly, Mt. Hood's antitrust complaint was timely filed.

IV.

Damages and Attorneys' Fees

Greyhound contends that Mt. Hood failed to offer adequate proof either that Mt. Hood was injured by Greyhound's conduct or of the amount of the damage. With respect to the fact of damage, Greyhound's claim is frivolous. The jury may infer the fact of damage if "plaintiff proves a loss, and a violation by defendant of the antitrust laws of such a nature as to be likely to cause that type of loss." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 697, 82 S.Ct. 1404, 1409, 8 L.Ed.2d 777 (1962). Mt. Hood offered evidence that its bridge traffic declined sharply during the relevant period.[35] Greyhound's conduct found to violate the antitrust laws was directed at creating

34. We need not reach Mt. Hood's contention that the statute was tolled to December 14, 1960, by virtue of Mt. Hood's commencement of the section 5(9) proceedings.

35. Mt. Hood offered evidence, for example, that Mt. Hood's bridge traffic consisted of 25,258 passenger trips, or approximately 44 percent of the total relevant bridge traffic, in 1963 and had fallen to 930 passenger trips, or approximately three percent of the total, by 1969.

precisely this kind of loss.[36] There was no indication of an alternative source of loss sufficient to negate an inference that Greyhound's violation was a material cause. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n. 9, 89 S.Ct. 1562, 23 L.Ed2d 129 (1969).

Mt. Hood's proof of the amount of damage was less certain, and necessarily so. What Mt. Hood's business volume and profits would have been except for Greyhound's antitrust violation is inescapably uncertain. *See Flintkote Co. v. Lysfjord*, 246 F.2d 368, 391 (9th Cir. 1957). In such a case, the amount of damages may be shown "as a matter of just and reasonable inference, although the result be only approximate." *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563, 51 S.Ct. 248, 249, 75 L.Ed. 544 (1931).

The premise of Mt. Hood's calculation of lost profits was that 95 percent of bus passengers would have traveled Mt. Hood's shorter bridge routes if they had had that choice. Greyhound asserts that Mt. Hood's premise "defies the record as well as common sense and is untenable," and therefore the entire calculation of damage fails. There was ample evidence from which the jury could reasonably infer that the shortest bus route is generally fastest, including studies comparing Greyhound's and Mt. Hood's schedules from 1950 to 1970 with regard to mileage and time.[37]

36. As described previously, Mt. Hood alleged and offered substantial evidence to prove that Greyhound had cancelled the north-south through-bus connection arrangement on which Mt. Hood depended for a substantial portion of its traffic, scheduled its services so as to preclude reasonable connections with Mt. Hood, directed independent and joint ticket agents to long-haul traffic around Mt. Hood, and interfered with distribution of Mt. Hood schedules.

37. These studies were part of a larger damage study commissioned by Mt. Hood. The study was supplemented by the testimony of three expert witnesses over a two-week period. The study was based on statistical computations verified by Arthur D. Little & Co., an independent management consulting firm. Mr. Jizmagian, Arthur D. Little & Co.'s representative who supervised the study, testified that maximum use was made of all available data supplied by Greyhound and where such data was not available every assumption and method "and every use of statistics and every use of ratios was done . . . with standard statistical techniques and there was, in my opinion, no speculative use of numbers." He concluded that the study accurately reflected Mt. Hood's damages.

Mt. Hood also introduced evidence from which the jury could reasonably infer that as a general rule 95 percent of bus passengers would take the fastest route when given a choice.[38] It is of course true that the evidence did not demonstrate to a certainty that 95 percent of passengers would have traveled Mt. Hood's shorter routes absent the restraints imposed by Greyhound's violation, but in the nature of the case proof to a certainty is not possible and is not required.

Greyhound challenges virtually every other facet of Mt. Hood's proof of damage. We have examined each of Greyhound's objections in light of Mt. Hood's response and the evidence in the record. No useful purpose would be served by a tedious recapitulation of these materials. We are satisfied that the evidence offered by Mt. Hood permitted the jury to make a reasonable and just inference of the amount of Mt. Hood's damage.[39]

We also sustain the award of attorneys' fees. Greyhound objects that the amount of the award divided by the number of hours devoted to the litigation by plaintiff's attorneys yields an exorbitant hourly rate. But as the experienced trial judge stated, "compensation at an hourly rate would be inadequate in a case of this kind," which "is, in many ways, unusual . . . its

38. For example, Mt. Hood's damage study, *see* note 37, *supra*, included a comparison of passenger utilization of three available " 'All Greyhound' routes from Oregon and Washington points to Los Angeles," showing that more than 95 percent of the bus passengers chose the shortest of the three available routes.

39. This holding also encompasses the damage awards for express traffic Mt. Hood lost between 1964 and 1971, and for local traffic it lost between 1964 and 1970.

complexity and difficulty set it apart from the common run of antitrust cases, if such a category in fact exists." The trial court based the award upon knowledge gained in four years' involvement in all aspects of the case, the evidence presented by the parties on this issue, and the factors prescribed in *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190 (9th Cir. 1964). The award represented an appropriate exercise of the district court's discretion.

Affirmed.

Appendix B

Order Denying Rehearing

United States Court of Appeals
for the Ninth Circuit

Mt. Hood Stages, Inc., dba Pacific Trailways, Plaintiff-Appellee, v. The Greyhound Corporation and Greyhound Lines, Inc., Defendants-Appellants.	No. 74-1282

[August 3, 1977]

ORDER

Before: BROWNING and WRIGHT, Circuit Judges, and *LINDBERG, District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

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*Honorable William J. Lindberg, Senior United States District Judge, Western District of Washington, sitting by designation.

Appendix C

District Court's Memorandum and Order

In the United States District Court
for the District of Oregon
Civ. No. 68-374

Mt. Hood Stages, Inc., doing business as Pacific Trailways,
Plaintiff,

v.

The Greyhound Corporation and Greyhound Lines, Inc.,
Defendants.

[November 29, 1973]

MEMORANDUM AND ORDER

GOODWIN, Judge:*

Greyhound has moved for a judgment notwithstanding the verdict and for a new trial in this treble-damage antitrust action which resulted in a verdict and judgment for Mt. Hood Stages. The principal issue is whether *Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363 (1973), compels a judgment n.o.v.

Greyhound asserts:

(1) The action is barred by Section 5(11) of the Interstate Commerce Act, 49 U.S.C. § 5(11);

(2) There was insufficient evidence (of conspiracy and of monopolization) to sustain the verdict;

(3) A new trial should be granted because of the numerous errors of law in the taking of evidence and in the instructions to the jury.

*The Honorable Alfred T. Goodwin, United States Circuit Judge, sitting as District Judge by designation.

All of these contentions rehearse issues which were briefed and argued extensively at trial and in hearings before trial. Now, as then, the law and the facts of this case are such that the issues must be resolved against the defendants. If there was error here or there in an evidentiary ruling, none was so prejudicial as to warrant the abortion of a lengthy trial. *See* Fed. R. Civ. P. 61.

The evidence revealed long-standing, calculated, and damaging conduct which, but for Section 5(11) of the Interstate Commerce Act, plainly would have violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2.

Mt. Hood proved, *inter alia*, that Greyhound had: (1) directed independent and joint ticket agents to long-haul traffic around Mt. Hood; (2) interfered with the distribution of Mt. Hood's schedules; (3) scheduled connecting service so as to preclude reasonable connections with Mt. Hood; and (4) discontinued through bus service important to Mt. Hood's scheduled routes.

The I.C.C. and reviewing courts have found that Greyhound willfully breached earlier representations made to the Commission in acquisition proceedings and engaged in destructive competition.[1] The destructive practices established by the record before the Commission were enjoined by a three-judge panel of a district court,[2] and Greyhound was subsequently held in criminal contempt for violating that injunction.[3] I mention these collateral

1. See, *e.g.*, Petition for Modification—Greyhound Mergers (Western Div.), 104 M.C.C. 449 (Div. 3, 1968); I.C.C. Affirmance of the Order of Division 3, No. MC-F-9136 (Dec. 11, 1968; April 14, 1969); *Greyhound Lines, Inc. v. United States*, 301 F.Supp. 356 (N.D. Ill. 1969) (denying motion for temporary restraining order).

2. *Greyhound Lines, Inc. v. United States*, 308 F. Supp. 1033 (N.D. Ill. 1970).

3. *United States v. Greyhound Corp.*, No. 71-CR-924 (N.D. Ill., June 27, 1973).

cases, not because I relied upon them in this case, but because they establish two points that do have some relevance to policy considerations that bear upon this case.

In the first place, the litigation before the Commission has proceeded for approximately a decade with no apparent impact upon Greyhound's conduct. If Congress intended the Interstate Commerce Act to provide a remedy for competitors injured by predatory behavior on the part of regulated carriers, then the legislation is woefully inefficient. Second, if proof outside the abundant proof in this record were needed, the collateral cases strip away any pretense that Greyhound's conduct toward its competitors was simply the result of good-faith aggressive management. The costs to Greyhound of the prolonged litigation before the Commission apparently have been more than offset by the profits Greyhound has derived by flouting the Commission's cease-and-desist orders. If there was ever a case in which a private action for damages is demonstrably necessary to carry out national antitrust policy, this is it.

Section 5(11) of the Interstate Commerce Act obviously is the key issue. That section provides, in relevant part:

> "* * * [A]ny carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction * * *." 49 U.S.C. § 5(11).

The effect of a similar statute on the antitrust liability of a supplier of airline equipment was recently decided by the Supreme

Court in *Hughes Tool Co. v. Trans World Airlines, supra.* When an agency, with the authority to immunize transactions from the operation of the antitrust laws, necessarily considers the public interest and approves conduct explicitly or implicitly before the agency as part of a proposed transaction, such conduct is thereby made immune from antitrust liability.

Mt. Hood poses the "flip side" of the *Hughes Tool* question: where a regulating agency with the authority to immunize conduct from the operation of the antitrust laws has not approved the conduct complained of, and indeed has ordered it stopped, does the approval by the agency of related transactions and the existence of a pervasive regulatory scheme, including the availability of some remedy, adequate or not, under that scheme preclude antitrust liability, I hold that it does not. *See Hughes Tool Co. v. Trans World Airlines*, 409 U.S. at 387:

> "We repeat, however, what we said in the *Pan American* case that the Federal Aviation Act does not completely displace the antitrust laws."

The Supreme Court has repeatedly made it clear that repeal of the antitrust laws is not to be lightly assumed. *See, e.g., Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289 (1973); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350 (1963); *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 456-57 (1945). *See also Price v. Trans World Airlines*, 481 F.2d 844 (9th Cir. 1973) (post-*Hughes Tool Co.* antitrust action stayed pending resort to Civil Aeronautics Board).

Mt. Hood is not here seeking the kind of relief that could be provided by the I.C.C.[4] That kind of relief has been sought, and for nearly ten years has proven to be illusory. Here Mt. Hood is

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4. See 49 U.S.C. §§ 9, 16. Though the I.C.C. has jurisdiction to award damages, this power is limited to cases in which damages result from activity which can be classified as a violation of the Interstate Commerce Act. *National Trucking & Storage Co. v. Pennsylvania R.R.*, 228 F.2d 23, 30 (D.C. Cir. 1955).

seeking only the antitrust remedy of treble damages, relief that can be granted only in court and which is supplemental to those administrative remedies which could be ordered by the I.C.C.

The antitrust issues raised by Greyhound's conduct were not considered or passed upon by the Commission in the initial acquisition proceedings. Were this court to hold that merely because the I.C.C. has authority to approve acquisitions, routes and schedules and order some relief with respect to some of the conduct complained of Congress has thereby placed exclusive jurisdiction in the I.C.C. over all conduct related to the approved transactions, this would amount to an almost total exemption of a carrier's conduct from the antitrust laws. Rather, all that *Hughes Tool* teaches is that the substantive exemptions from the antitrust laws created by Congress or required by the structure of the regulatory scheme are not destroyed through by-passing or overriding the forum chiefly entrusted with the regulation of the industry in question. *See REA Express v. Alabama Great So. Ry.*, 412 U.S. 934 (1973) (affirming a three-judge court's *stay* of an antitrust suit pending I.C.C. reconsideration of a prior financing arrangement order on the issue of possible antitrust immunity).

A court's antitrust jurisdiction is ousted only when the specified agency, pursuant to its statutory authority, approves the challenged actions. If an agency thus grants an exemption from the antitrust laws, that determination is binding unless a court should set it aside for one of the reasons enumerated in Section 10(c) of the Administrative Procedure Act.[5] By the same token, however, conduct which not only has not been expressly approved but

5. *E.g.*, 5 U.S.C. § 706(2):
"(A) arbitrary, capricious, an abuse of discretion * * *;
"(B) contrary to constitutional right * * *;
"(C) in excess of statutory jurisdiction * * *;
"(D) without observance of procedure required by law;
"(E) unsupported by substantial evidence * * *;
"* * * * * *."

which has been expressly disapproved by the agency ought then to be subject to antitrust remedies supplemental to those which could have been granted by the agency.

A contrary decision would not only be an unsound reading of legislative intent, but would also be impractical. It would foreclose from the courts the option of utilizing primary jurisdiction, a technique which does not preclude a later judicial antitrust proceeding should the agency first determine that the complained-of acts were not immunized. *Cf. Ricci v. Chicago Mercantile Exchange*, 409 U.S. at 305-06; *Federal Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481, 498-99 (1958). Greyhound's reading of Section 5(11) would place upon the I.C.C. the impossible burden of anticipating and ruling upon all the possible antitrust implications of all conduct conceivably related to any transaction subject to I.C.C. approval at the risk of subsequently being held to have conferred a blanket antitrust immunity.

In my other rulings, and in rejecting various proposed instructions, I tried to state my reasons as the case progressed. Accordingly, I will not extend this Memorandum by repeating those reasons here.

IT IS ORDERED:

(1) The motion for judgment notwithstanding the verdict is denied;

(2) The motion for a new trial is denied;

(3) The court will hear counsel on the matter of attorney's fees at 10:00 a.m., December 14, 1973.

DATED this 29th day of November, 1973.

/s/ ALFRED T. GOODWIN
Alfred T. Goodwin
United States Circuit Judge,
sitting as District Judge
by designation.

Appendix D

District Court's Memorandum and Order re Attorneys Fees

In the United States District Court
for the District of Oregon
Civ. No. 68-374

Mt. Hood Stages, Inc., doing business as Pacific Trailways,
Plaintiff,

v.

The Greyhound Corporation and Greyhound Lines, Inc.,
Defendants.

[December 21, 1973]

MEMORANDUM AND ORDER ON ATTORNEY FEES

After reviewing the file, the exhibits offered in support of the claim for attorney fees, and all the evidence offered by both parties on the question of a reasonable attorney fee, I have concluded that compensation at an hourly rate would be inadequate in a case of this kind.

I have considered all of the factors Judge Hamley enumerated in *Twentieth Century Fox Film Corp. v. Goldwyn,* 328 F.2d 190 (9th Cir.), *cert. denied,* 379 U.S. 880 (1964), and have given weight to all of them. I believe that this case is, in many ways, unusual, and that its complexity and difficulty set it apart from the common run of antitrust cases, if such a category in fact exists.

I will not attempt to go through the figures, or the evaluation process, by assigning cash value to the various elements. Rather, I have decided to give substantial effect to the result achieved, and to the other factors in the perspective of the four years I have known the case in all its details. I have concluded that a

reasonable fee to be assessed against the defendant is the sum of $1,250,000. The attorney's fee is to bear interest at the statutory rate for judgments until paid.

The Clerk will draw and submit for my signature a final judgment, accordingly in the total sum of $14,396,090.00, plus costs to be taxed.

/s/ ALFRED T. GOODWIN
United States Circuit Judge,
sitting as District Judge
by designation.

Appendix E

Statutes Involved

Section 5 of the Interstate Commerce Act, 49 U.S.C. § 5, provides in relevant part as follows:

(2)(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) or paragraph (3) of this paragraph—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; . . .

(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305(e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a

public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: . . .

(10) The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2), or (8), of this section, as it may deem necessary or appropriate.

(12) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, unless a different vote is required under applicable State law, in which case the number so required shall assent, of the votes of the holders of the shares entitled to vote of the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of

law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. . . .

Section 4B of the Clayton Act, 15 U.S.C. § 15b, provides as follows:

Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections.

Section 5 of the Clayton Act, 15 U.S.C. §§ 16(a), (i), provides in relevant part as follows:

(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided,* That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title.

* * * *

(i) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private or State right of action arising under said laws and based in whole or in part on any matter complained of in said

proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 or 15c of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

Appendix F

Excerpts From CCH Trade Regulation Reports, Number 285 PT. I, pp. 8-10 (June 13, 1977).

AIRLINES

TRANSATLANTIC NO-FRILLS—Justice view . . . Laker Airways' proposed transatlantic "Skytrain" service should be approved without delay, the Department of Justice told the Civil Aeronautics Board.

* * * *

. . . The Department supported a consolidated proceeding to consider the applications of U. S. carriers to provide a low-fare, no-frills transatlantic service competitive to that offered by Laker, it said . . . .

While acknowledging that some type of consolidated and expedited proceeding is required, the Department opposes delaying the processing of Laker's application until resolution of the consolidated proceeding: "There is no reason to deprive U. S. passengers of immediate benefits of a creative, low-cost air service simply to accommodate U. S. carriers" (Statement of Position of U. S. Department of Justice, June 6, 1977, *Agreements Among Members of the International Air Transport Assn.*, CAB Dkt. No. 28672).

TRAVEL AGENT COMMISSION PACT—Justice view . . . Proposed International Air Transport Association agreements to fix the commissions earned by travel agents on sales of international airline tickets should be disapproved, the Department of Justice advised the Civil Aeronautics Board.

The Department's views were filed by the Antitrust Division with the Board after hearings on the matter. The hearings confirmed the Division's previously expressed view that approval of the agreements would not be in the public interest, according to Joe Sims of the Antitrust Division.

* * * *

(Consolidated Answer of the U. S. Department of Justice, June 6, 1977, CAB Dkt. Nos. 30927, 25908, 25427, 25457, 30912 and 30917).

INTERCITY BUSES

LATIN EXPRESS—Justice view on denial of application . . . Denial to a small bus company of authority to provide new intercity service incurred competition policy protests from the Department of Justice.

This was the second time in two months that such an application was rejected by the Interstate Commerce Commission and, in each case, denial was premised on the potential harm that the new service could have on Greyhound and Trailways bus operations, according to the Department's June 6 announcement.

The Department said its comments were in a petition filed by the Antitrust Division supporting the application of Latin Express Service, Inc., to operate new service between Miami, Florida, and Union City, New Jersey. . . .

* * * *

RAIL/WATER

ALASKA RATE FIXING—Justice view . . . Reject a rate-fixing agreement filed by the Alaska Rail-Water Association, the Department of Justice stated to the Interstate Commerce Commission.

* * * *

The Association is asking the Commission to approve an agreement by its members to fix rates for through routes between continental United States and Alaska; approval, if lawful, would immunize Association members from antitrust liability for rate-fixing, according to the Department's Antitrust Division. It told the ICC that the proposed agreement would eliminate com-

petition for rail-water movements on these routes and was beyond the Commission's authority to approve because the Railroad Revitalization and Regulatory Reform Act of 1976 limits Commission authority to immunize rate-fixing agreements from antitrust prosecution. . . .

TELEVISION

FCC NETWORK INQUIRY—Justice view . . . Listing a number of national television network contractual and advertising practices that it believes should be given special attention, the Department of Justice recommended procedures to expedite a Federal Communications Commission inquiry into practices of television networks and suggested measures to ensure effective participation by all interested parties.

* * * *

The comments were filed to help the Commission identify practices that may deter competition in television broadcasting, Joe Sims said, adding that the recommended procedures should help the inquiry explore fully all network-affiliate relationships and should guarantee prompt availability of a complete record to the full Commission (Motion of U. S. Department of Justice for Leave to File Late Comments, June 8, 1977, *Commercial Television Network Practices and the Ability of Station Licenses to Serve the Public Interest,* FCC Dkt. No. 21049 RM-2749).

Supreme Court, U. S.
FILED
FEB 22 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-598

THE GREYHOUND CORPORATION AND GREYHOUND LINES, INC.,
Petitioners,

v.

MT. HOOD STAGES, INC., doing business as Pacific Trailways,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petition for Certiorari Filed October 25, 1977
Certiorari Granted January 9, 1978

BORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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July 5, 1968	Complaint	1-12
January 23, 1970	First Amended Complaint for Treble Damages and Injunctive Relief Under the Antitrust Laws and Unfair Competition Laws	306-315
April 22, 1970	Second Amended Complaint for Treble Damages Under the Antitrust Laws and for Damages Under the Unfair Competition Laws	439-448
June 8, 1970	Answer of Defendant Greyhound Lines, Inc., to Second Amended Complaint	451-456
July 27, 1971	Third Amended Complaint for Treble Damages Under the Antitrust Laws and for Damages Under the Unfair Competition Laws	691-700
August 23, 1971	Answer of Defendant Greyhound Lines, Inc., to Third Amended Complaint	702-706
June 7, 1972	Plaintiff's Supplemental Complaint	1015-1016
June 29, 1972	Answer of Defendant The Greyhound Corporation to Third Amended Complaint	1140-1144
July 6, 1972	Answer of Defendant Greyhound Lines, Inc., to Supplemental Complaint	1147-1148
July 6, 1972	Answer of Defendant The Greyhound Corporation to Supplemental Complaint	1151-1152
November 22, 1972	Letter dated November 22, 1972, from Judge Alfred T. Goodwin to counsel	1354-1357
May 2, 1973	Record of Jury Trial	2247
May 2, 1973	Special Verdict	2248-2249

Date	Document	Record Reference
May 9, 1973	Motion for Judgment Notwithstanding the Verdict, for a New Trial and to Strike Certain Evidence	2256-2258
May 11, 1973	Judgment	2261
May 15,1973	Renewal of Defendants' Motions	2262
May 18, 1973 (Received)	Petition of United States of America for Leave to Intervene (dated December 14, 1964)	2266-2273
May 18, 1973 (Received)	Order (dated June 4, 1965) (sic)	2275-2279
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December 21, 1973	Amended Judgment	3273
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Date	Document	Record Reference
February 19, 1974	Docketed Cause and entered Appearances of Counsel	
March 19, 1974	Filed 25 Appellants' Briefs	
May 30, 1974	Filed 25 Appellee's Briefs	
July 11, 1974	Filed 25 Appellants' Reply Briefs	
January 6, 1975	Cause Argued and Submitted	
June 9, 1977	Filed Opinion—Affirmed	
June 9, 1977	Filed and Entered Judgment	
June 23, 1977	Filed Appellants' Petition for Rehearing with Suggestion for Rehearing En Banc	
August 4, 1977	Filed, as of August 3, Order: The Petition for Rehearing is denied and the suggestion for a rehearing in banc is rejected	
October 31, 1977	Received from Supreme Court Notice of Filing Petition for Certiorari on October 25, 1977, and assigned No. 77-598	

In the Supreme Court of the United States

January 9, 1978	Filed Order granting certiorari limited to Question 3 presented by the petition	

Before the Interstate Commerce Commission

In Re:

The Greyhound Corporation - Acquisitions:

Union Pacific Stages	MCF 5190	58 MCC 809
O.C. & N. Stages, Inc.	MCF 3102	50 MCC 123
Yahne, Inc. dba Inland Stages	MCF 3208	
Oregon Motor Stages	MCF 5403	50 MCC 657
Washington Motor Coach	MCF 3295	45 MCC 821
North Coast Lines	MCF 3687	55 MCC 801
B.C. Motor Transportation	MCF 5534	60 MCC 643
Pacific Greyhound Lines	MCF 5733	70 MCC 59

PETITION OF MT. HOOD STAGES, INC., FOR AN ORDER REOPENING OF THE ABOVE CAPTIONED CASES AND ATTACHING CERTAIN TERMS, CONDITIONS AND LIMITATIONS TO THE EXERCISE OF THE PRIVILEGES THEREIN GRANTED.

ALTERNATIVE PETITION FOR DIVESTITURE.

Comes now Mt. Hood Stages, Inc., an Oregon corporation, doing business under the assumed name Pacific Trailways (hereinafter referred to as Mt. Hood) to respectfully petition the Commission for an order reopening all of the above captioned cases for further hearing to consider the necessity of attaching certain terms, conditions and limitations to the privileges therein granted, as hereinafter set forth and requested, or, in the alternative, to order The Greyhound Corporation to divest itself of operations acquired in said proceedings.

In support of its petition, Mt. Hood represents and avers as follows: [1410]

I.

Mt. Hood is now and for more than 30 years has been a common carrier of passengers by motor bus, in interstate and intrastate commerce over regular routes. Its I.C.C. authority is held under docket number M.C. 70947. Page 1 of the 8-page exhibit attached hereto, and by this reference made a part hereof, shows Mt. Hood's regular routes. All of said routes pertinent to this petition are improved highways with relatively easy grades and curves over which the maximum legal speed for busses can be comfortably maintained.

II.

The vendor companies named in the series of cases set forth in the caption of this petition, supra, and which are now a part of the Greyhound Corporation system, operated over principal routes as shown in Exhibit 1, as follows:

Page 2, Pacific Greyhound Lines
Page 3, O.C. & N. Stages and Inland Stages
Page 4, Washington Motor Coach
Page 5, North Coast Transportation Co.
Page 6, Union Pacific Stages
Page 7, Oregon Motor Stages

Page 8 of Exhibit 1 shows the present encirclement of Mt. Hood by the Greyhound Corporation, resulting from the acquisitions listed in the caption hereof. The solid black lines are principal Greyhound routes, including, north of the U.S.-Canadian boundary, routes of Greyhounds's wholly owned Western Canadian Greyhound Lines. The dotted lines on page 8 show the routes of Mt. Hood. [1411]

III.

Mt. Hood's routes between Albany and Eugene, Oregon, on the one hand, and, on the other, points east of the Oregon-Idaho line, are shorter by 113 miles than the present all Greyhound routes via Portland. This mileage savings can

be realized by passengers originating at or destined to Western Oregon points on Greyhound routes such as Corvallis, Newport, Roseburg, Grants Pass, Coos Bay, etc. A joint-line service via Greyhound connecting with Mt. Hood at Eugene and Albany in western Oregon and at Ontario in eastern Oregon would be up to 4 hours faster than the present all Greyhound route through Portland. Because of the shorter mileage, Mt. Hood's fares are as much as $3.00 cheaper than the all Greyhound fares via Portland between said points in western Oregon, on the one hand, and, on the other, points served by both Greyhound and Mt. Hood east of the Oregon-Idaho boundary.

IV.

The mileage via a joint-line Greyhound-Mt. Hood route between Klamath Falls, Oregon and points south thereof, on the one hand, and, on the other, The Dalles and Biggs, Oregon and points on Greyhound routes north and east thereof, is approximately 116 miles shorter than via the all-Greyhound route through Portland.

Mt. Hood's routes via Bend and Burns, Oregon between Klamath Falls, on the one hand, and, on the other, Ogden, Utah and points north thereof on Greyhound's routes are approximately [1412] 23 miles less than the all-Greyhound route via Reno, Nevada and Salt Lake City, Utah.

Mt. Hood's route between Klamath Falls and Portland and points north thereof via Bend, Oregon is 19 miles longer than the Greyhound route via Eugene. Mt. Hood's route along the east side of the Cascade range of mountains, coming within ten miles of the perpetually snowcapped peak of Mt. Hood is very scenic in both summer and winter. Running time over Mt. Hood's route is approximately the same as Greyhound schedules via Eugene.

V.

The routes served by Mt. Hood east and west across Oregon and north and south between Klamath Falls and The Dalles are not served by any other surface common carrier of passengers. Greyhound and Mt. Hood have long followed the practice of honoring each other's tickets, participating in joint through rates and maintaining convenient connecting schedules. Greyhound has, in the past, showed Mt. Hood's service in its schedule folders, showed its routes upon maps furnished to its agents, and allowed Mt. Hood representatives to call upon Greyhound agencies to solicit the routing of passengers over its routes.

Two through schedules were established between San Francisco and Spokane, using Mt. Hood's Klamath Falls-The Dalles route as a "bridge" between Pacific Greyhound and [1413] Northwest Greyhound, which saved approximately 116 miles and as much as 5 hours compared with the all-Greyhound service via Portland. One of the two schedules was operated with a through bus under lease to Mt. Hood and driven by Mt. Hood drivers between Klamath Falls and The Dalles.

VI.

In its applications to the I.C.C. for authority to acquire and/or merge the said predecessor companies, Greyhound represented that the transactions would have no adverse effect upon other carriers. In the application to acquire U.P. Stages dba Overland Greyhound, for example, it was represented that the proposed transaction would "have no material adverse effect upon other carriers as Overland's routes will remain open to all other carriers" and that "The proposed transaction will foster and not impair carrier competition". (p. 59 of application, Exh. D)

A hearing was held at Washington, D.C. upon said application. Mt. Hood's manager appeared with counsel in opposition and expressed the fear that, after consummation, the Greyhound Corporation would engage in practices detrimental to Mt. Hood and the bus riding public. Witnesses for the applicants represented as follows:

> "It would have no effect on competition because it would not change our relations with any of our connections (R.J.O'Connor, General Traffic Manager, Overland System, tr 40). Counsel for the applicants said "You can take that as a commitment, because it [1414] is the same statement that the executive of the Greyhound Corporation will make". (Mr. Turney, tr 43)
>
> "One of the officers of the Greyhound Corporation who had discussed it with the president of Pacific Greyhound stated that he would authorize a witness for the corporation to state that, insofar as they were concerned, they had no idea of changing the present arrangements which they have with Pacific Trailways".

He also said that similar assurance applied with respect to the then present arrangements between Mt. Hood and Northwest Greyhound (formerly Washington Motor Coach). (L.H.Ristow, Director of Traffic, The Greyhound Corp. tr. 84)

Mr. Bogan, Executive Vice President and board member of the Greyhound Corporation and all of its subsidiaries, said that he had approved the arrangement for through busses operating between San Francisco and Spokane over Mt. Hood's route between Klamath Falls and The Dalles, Oregon, and that "It will be maintained". (tr. 95)

In reliance upon these representations, Mt. Hood withdrew as a protestant in that case. (tr. 143)

Mt. Hood protested Greyhound-Control-O.C. & N. Stages (MCF 3102) and Greyhound-Control-Yahne, Inc. dba Inland Stages (MCF 3208). O.C. & N. operated south of Klamath Falls to Reno and Yahne, between Reno and Los Angeles. Mt. Hood's contention was that these acquisitions would eliminate its only possible non-competitive connection for California traffic. [1415]

The examiners' report in the O.C. & N. case found that the proposed acquisition would result in "the elimination of the only independent motorbus company by Pacific Greyhound in a territory where they now have a virtual monopoly • • •" "Considering the acquisition by Pacific Greyhound of O.C. & N. alone, or in conjunction with the operation of Inland Stages, in which Pacific Greyhound already has a 3/7th interest, the examiners cannot find the transaction to be consistent with the public interest."

The Greyhound Corporation and its then subsidiary Pacific Greyhound succeeded in reversing the examiners. In their exceptions they said:

> "The Examiner has failed to review the contravening testimony of Mr. Fraley, reported upon pages 243 and 244 of the transcript. According to that testimony, the promise of Pacific Greyhound was that 'there would not be discrimination in the sale of transportation into the eastern Washington territory over the combined routes of Pacific Greyhound Lines to Klamath Falls and thence to The Dalles via the Pacific Trailways, there connecting with other carriers into the Northwest. In other words, a passenger is to have his choice of routes.' This testimony was not thereafter controverted."

The two cases were decided in a single report (50 MCC 123). The Division was apparently convinced that Mt. Hood's fears were groundless and granted those applications.

Without going into details petitioner states generally that the applications to acquire the other companies listed herein contained similar representations that they would have no adverse effect upon competition. [1416]

VII.

Since accomplishing the encirclement of Mt. Hood by means of said acquisitions and mergers, Greyhound is employing practices which are the opposite of the representations made to the Commission to secure approval, as follows:

(a) Ceased showing Mt. Hood schedules in Greyhound folders while continuing to show the service of numerous other non-Greyhound lines.
(b) Discontinued the through bus operated in connection with Mt. Hood between San Francisco and Spokane.
(c) Changed its schedules between San Francisco and Klamath Falls and between Biggs, Oregon and Spokane so as to break connections with Mt. Hood and force a delay of approximately 3 hours for any passenger seeking to use the shorter route via Mt. Hood.
(d) Cause its agents to fail or refuse to quote Mt. Hood's service and fares to inquiring prospective passengers, even when the Mt. Hood route is substantially shorter, the joint Greyhound-Mt. Hood service is substantially faster, and the fares lower than an all-Greyhound route.
(e) Caused its agents to quote Mt. Hood service in an unfavorable light, or in an inaccurate manner, to inquiring prospective passengers who specifically request information on Mt. Hood service.
(f) Discontinued showing Mt. Hood's connecting routes upon its maps while continuing to show the connecting routes of numerous other non-Greyhound carriers.
(g) Requested Mt. Hood to discontinue calling upon Greyhound agencies.
(h) Refused to establish joint through rates. [1417]
(i) At Greyhound depots also occupied by Mt. Hood it discriminates against Mt. Hood by refusing to announce over its speaker systems or to show upon its schedule boards Mt. Hood's departures for points which can be reached via an all-Greyhound route, or to impartially inform prospective passengers inquiring, over the phone or over the counter, of Mt. Hood's service and fares to such points.
(j) At commission agencies which sell both Greyhound and Mt. Hood tickets where, because of its vastly greater coverage and correspondingly greater sales possibilities for the agent, Greyhound is in a position to dictate and exert pressure, it influences such agents to favor Greyhound in the quoting of service, display of advertising, and in other respects.

VIII.

By means of the acquisitions herein listed, and others, The Greyhound Corporation has attained a position of unparalleled dominance in the intercity scheduled motor bus business in the Pacific Region as shown by the following figures from the Commissions Bureau of Transport Eco-

nomics and Statistics on Class 1 Motor Carriers of Passengers, 1963:

	Revenues	Per Cent of Pacific Region Total
Greyhound	$113,266,659	96.1
Mt. Hood	1,294,904	1.1
Las Vegas-Tonopah-Reno	813,539	.69
Continental-Pacific	768,051	.65
Orange Belt Stages	554,871	.47
Peerless Stages	490,128	.41
Sun Valley Bus Lines	337,265	.28
Citizen Auto Stage Co.	223,749	.19
Santa Fe Tpn.	126,622	.11
Total Pacific Region	$117,875,788	100.00

[1418]

IX.

The certificates reissued to Greyhound in the hereinbefore listed acquisitions are all "subject, however, to such terms, conditions and limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier."

Part I Section 5(9) of the Act gives the Commission specific authority to make such supplemental orders "as it may deem necessary or appropriate" in acquisition cases.

Your petitioner respectfully requests that all of the said proceedings be reopened and assigned for further hearing to receive evidence supporting the allegations herein contained and which, your petitioner believes, will justify the insertion in the said acquired certificates of terms, conditions and limitations which will have the effect of prohibiting the discriminatory and destructive competitive practices hereinbefore described, requiring restoration of useable joint-line schedules between points south of Klamath Falls, on the one hand, and, on the other, points north

and east of The Dalles and Biggs, Oregon, and otherwise specifically enforcing the promises, representations and assurances relied upon by the Commission in approving the said acquisitions.

Your petitioner prays in the alternative that Greyhound be required to divest itself of self paralleling opera- [1419] tions operations [sic] acquired by means of said false representations, for example:

(a) One of the two routes acquired between The Dalles and Spokane, Washington.
(b) The Klamath Falls-Los Angeles route acquired from O.C. & N. and Inland Stages which gave it a third route between California points and points in Washington and Oregon.
(c) The route acquired from B.C. Motors exactly paralleling the route acquired from North Coast Lines.

Expedited handling of this matter is requested.

Dated at Portland, Oregon
October 7, 1964.

MT. HOOD STAGES, INC.
dba Pacific Trailways
By: WILLIAM A. NISKANEN
William A. Niskanen
Vice President and Manager
1048 Bond Street
Bend, Oregon
/s/ DONALD A. SCHAFER
Donald A. Schafer
Attorney at Law
12321 S.E. Evergreen Highway
Vancouver, Washington [1420]

VERIFICATION

STATE OF OREGON }
County of Multnomah } ss.

WM. A. NISKANEN, being duly sworn, deposes and says: that he is Vice President and General Manager of the petitioner in the above entitled proceedings; that he has read the foregoing petition and knows the contents thereof; that the same is true as stated, except as to matters and things, if any, stated on information and belief, and that as to those matters and things, he believes them to be true.

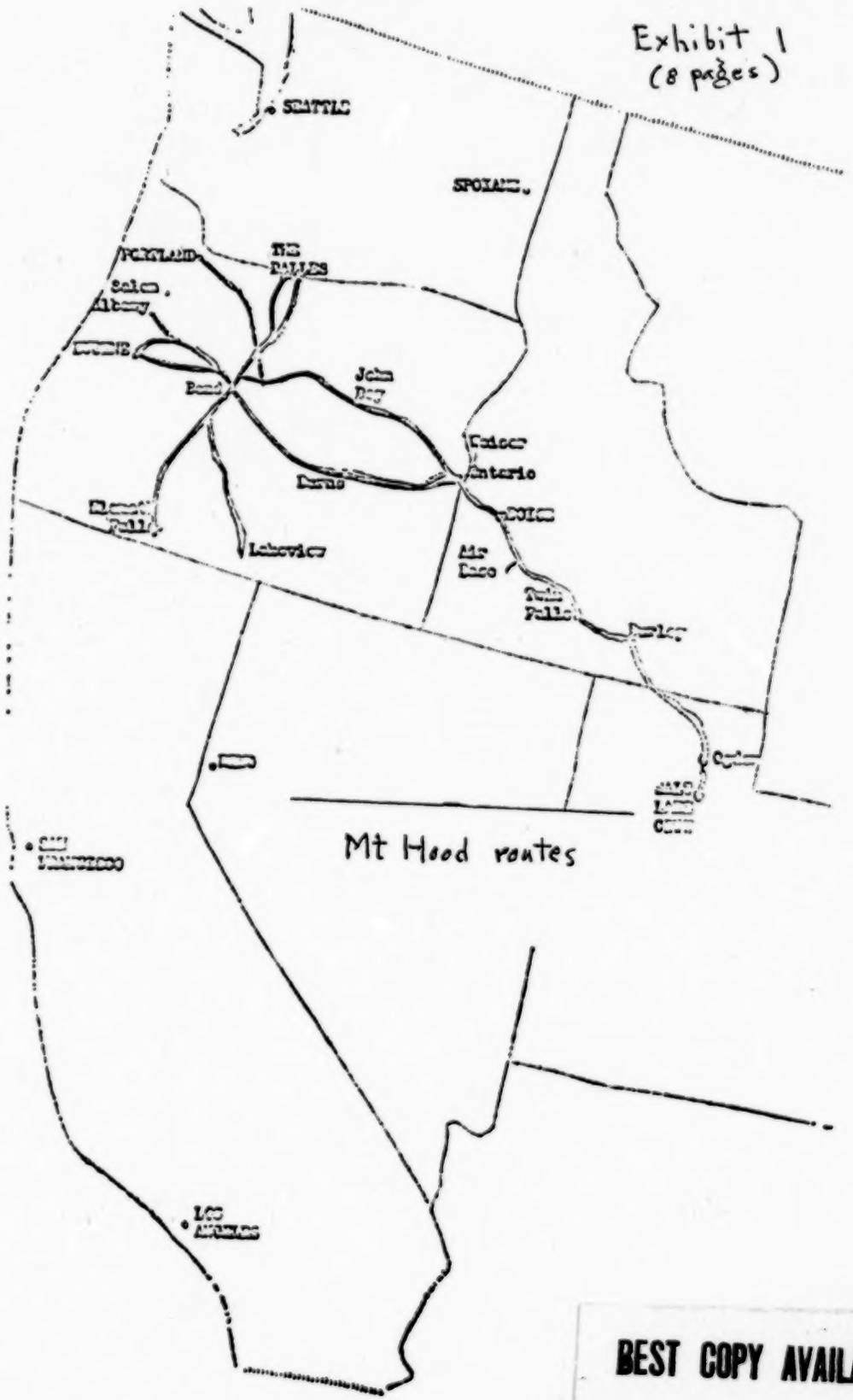
/s/ WM. A. NISKANEN

Subscribed in my presence, and sworn to before me, by the affiant above named, this 7th day of October, 1964.

/s/ GRACE G. MURRAY
Notary Public for Oregon
Commission expires 8/5/68 [1421]

[Certificate of service omitted in printing]

[EXHIBITS FOLLOW]



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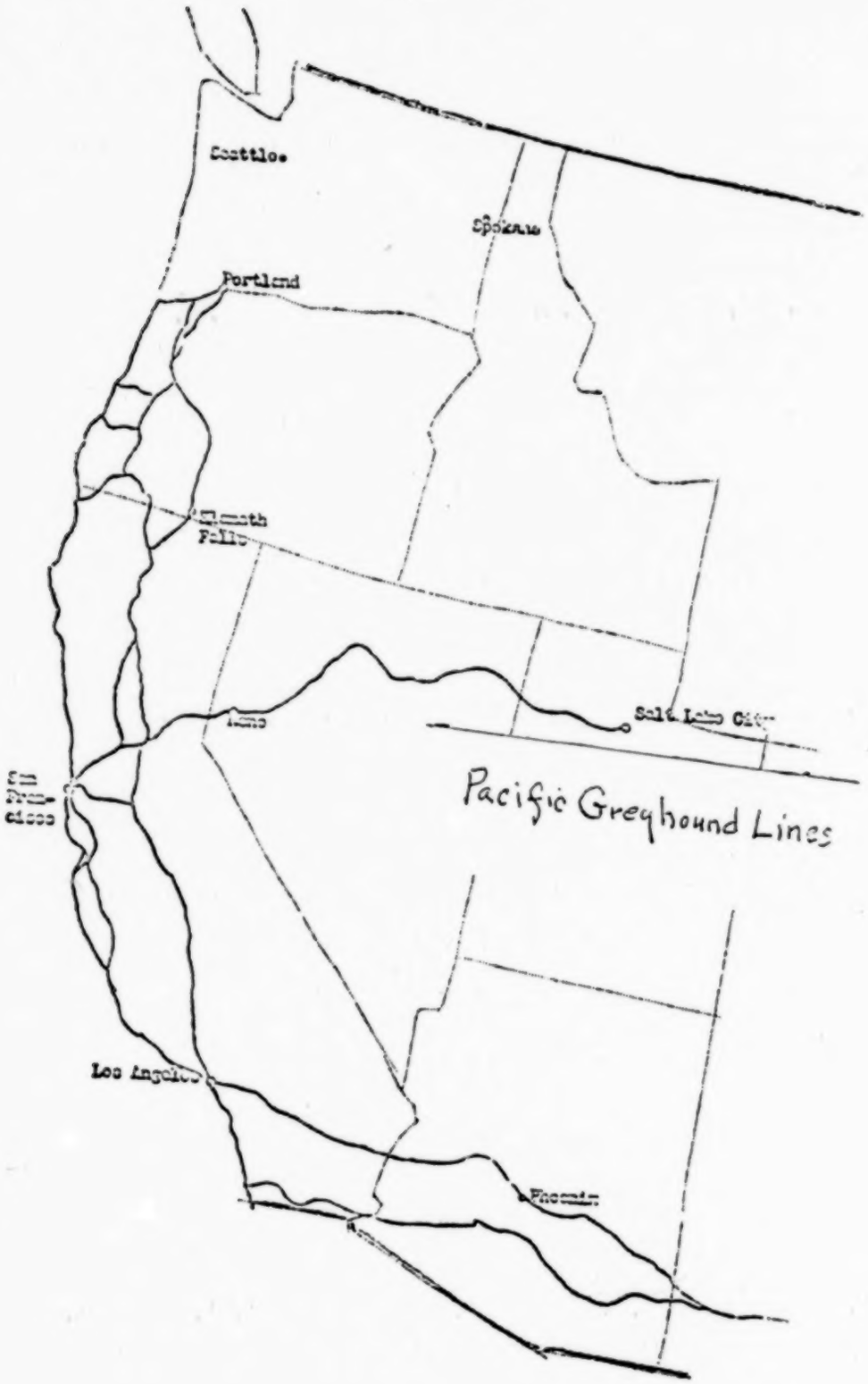
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Phoenix
Pacific Greyhound Lines

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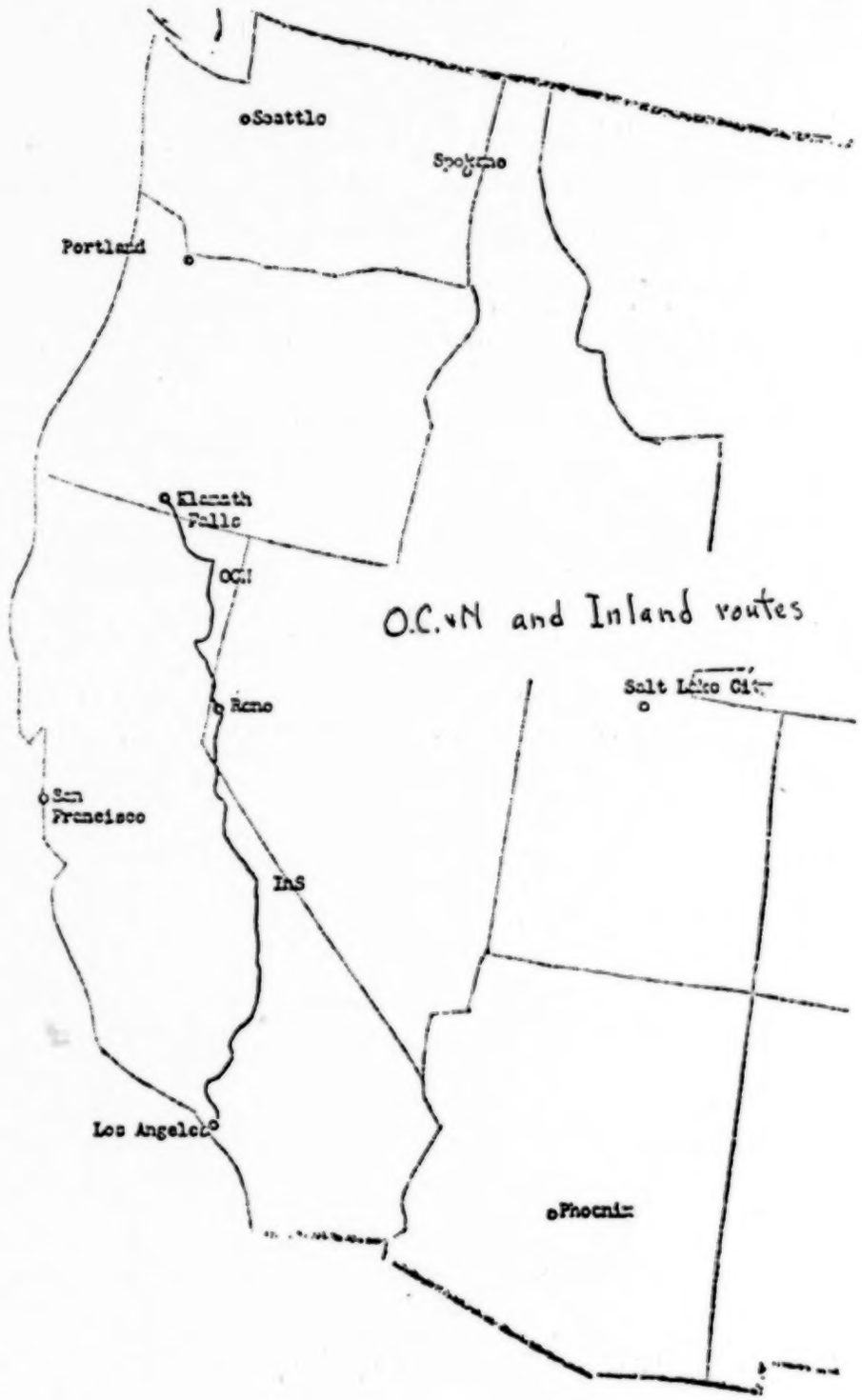
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Salt Lake City
San Francisco
Los Angeles
Phoenix
O.C.vN and Inland routes

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Washington Motor Coach

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North Coast Transportation Co.

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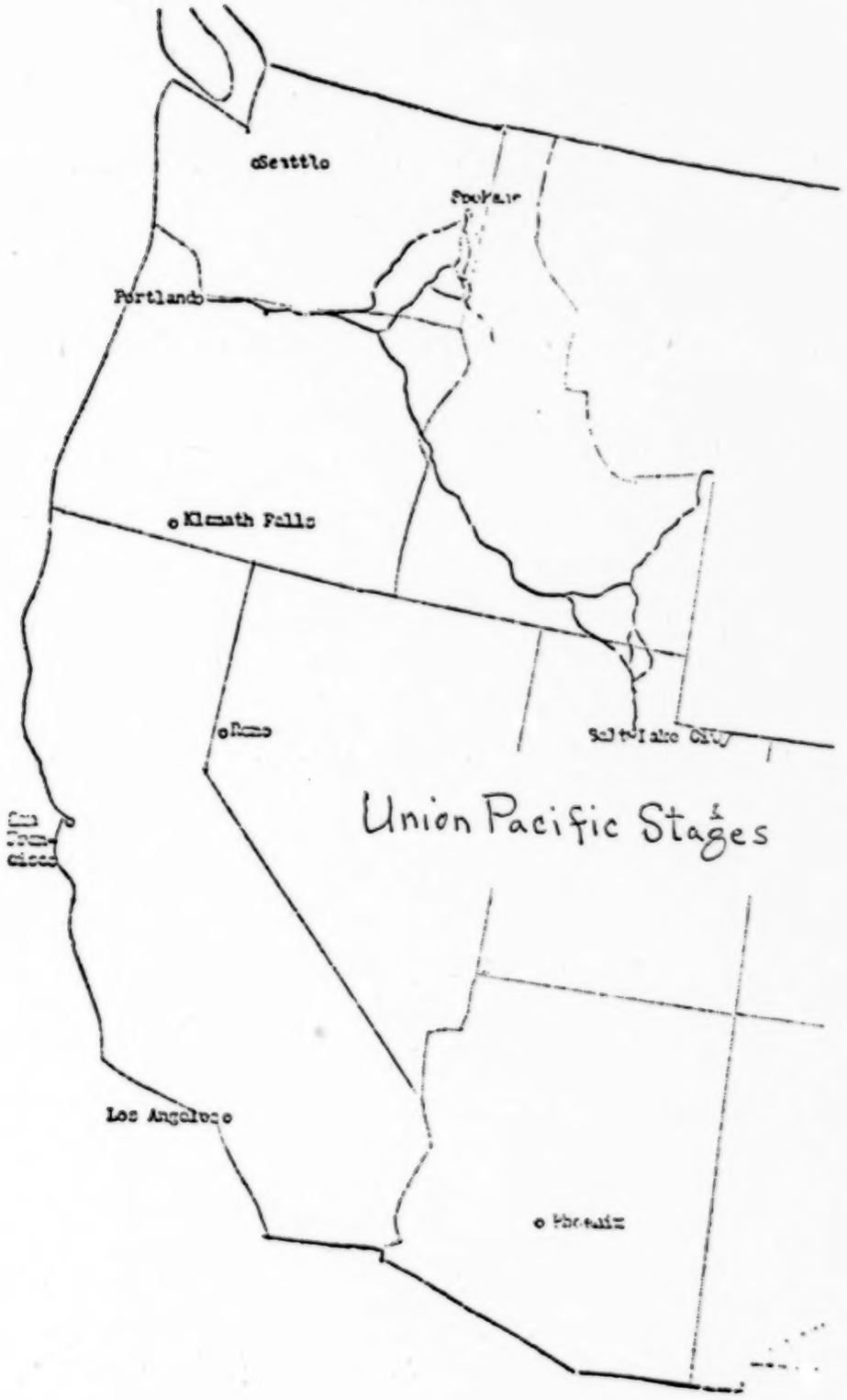
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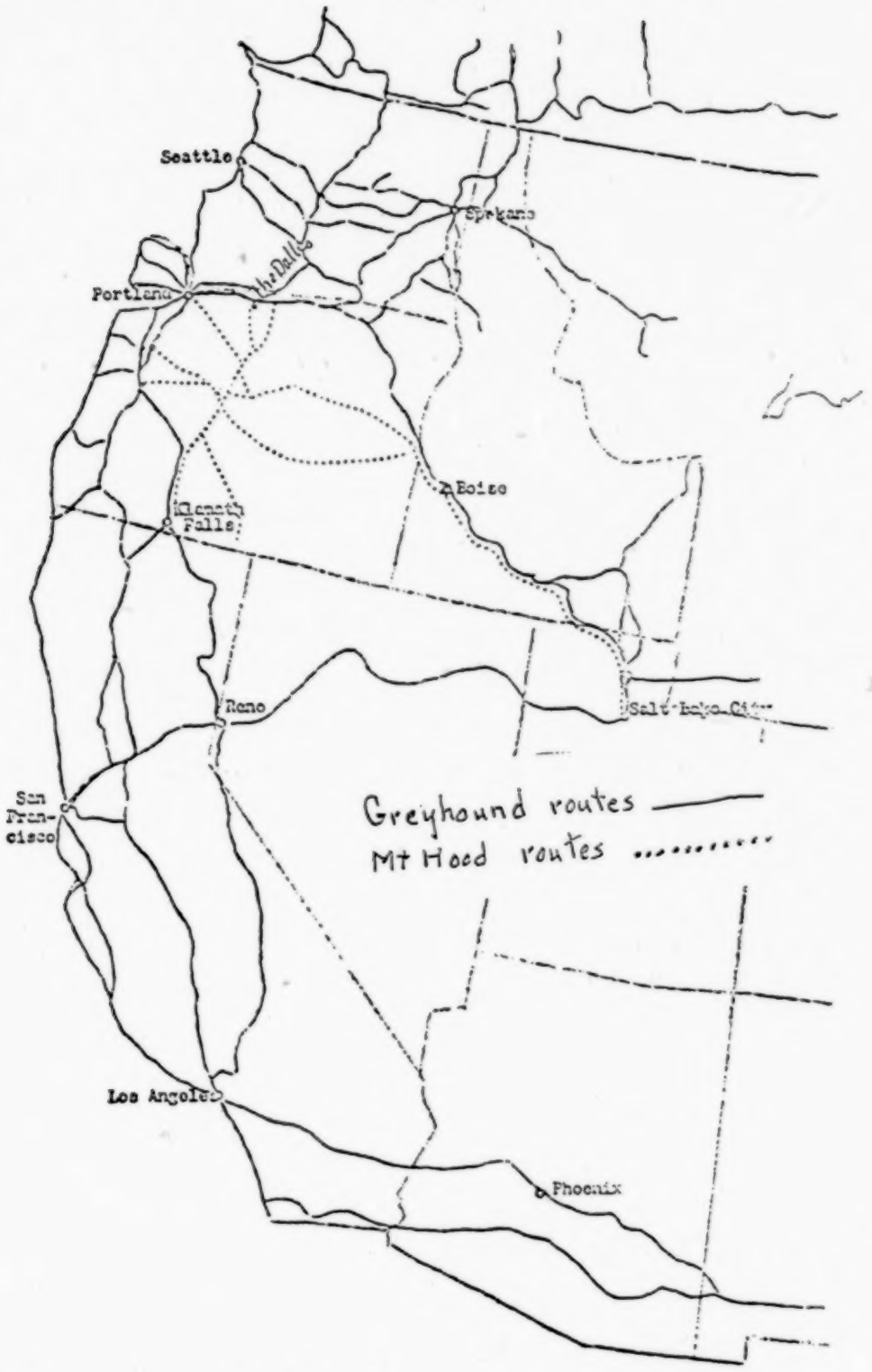

8

Before the Interstate Commerce Commission

In Re:

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E.C. Motor Transportation	MCF 5534	60 MCC 643
Pacific Greyhound Lines	MCF 5733	70 MCC 59

AMENDMENT TO PETITION

Comes now Mt. Hood Stages, Inc., dba Pacific Trailways to amend its petition (filed October 7, 1964) to reopen the above captioned cases for further hearing, as follows:

Substitute the attached amended pages 1, 9, 10, 11, and 12 for the present pages 1, 9, 10, 11 and 12, and add the attached pages 13 and 14.

Dated at Portland, Oregon

December 1, 1964

/s/ DONALD A. SCHAFER
Donald A. Schafer
Attorney for Mt. Hood Stages, Inc.
12321 S.E. Evergreen Highway
Vancouver, Washington 98664 [1402]

PETITION OF MT. HOOD STAGES, INC.,
FOR AN ORDER REOPENING OF THE ABOVE
CAPTIONED CASES AND ATTACHING CERTAIN
TERMS, CONDITIONS AND LIMITATIONS TO
THE EXERCISE OF THE PRIVILEGES
THEREIN GRANTED.

Comes now Mt. Hood Stages, Inc., an Oregon corporation, doing business under the assumed name Pacific Trailways (hereinafter referred to as Mt. Hood) to respectfully petition the Commission for an order reopening all of the above captioned cases for further hearing to consider the necessity of attaching certain terms, conditions and limitations to the privileges therein granted, as hereinafter set forth and requested.

In support of its petition, Mt. Hood represents and avers as follows: [962]

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Page 8 of Exhibit 1 shows the present encirclement of Mt. Hood by the Greyhound Corporation, resulting from the acquisitions listed in the caption hereof. The solid black lines are principal Greyhound routes, including, north of the U.S.-Canadian boundary, routes of Greyhound's wholly owned Western Canadian Greyhound Lines. The dotted lines on page 8 show the routes of Mt. Hood. [963]

III.

Mt. Hood's routes between Albany and Eugene, Oregon, on the one hand, and, on the other, points east of the Oregon-Idaho line, are shorter by 113 miles than the present all Greyhound routes via Portland. This mileage savings can be realized by passengers originating at or destined to Western Oregon points on Greyhound routes such as Corvallis, Newport, Roseburg, Grants Pass, Coos Bay, etc. A joint-line service via Greyhound connecting with Mt. Hood at Eugene and Albany in western Oregon and at Ontario in eastern Oregon would be up to 4 hours faster than the present all Greyhound route through Portland. Because of the shorter mileage, Mt. Hood's fares are as much as $3.00 cheaper than the all Greyhound fares via Portland between said points in western Oregon, on the one hand, and, on the other, points served by both Greyhound and Mt. Hood east of the Oregon-Idaho boundary.

IV.

The mileage via a joint-line Greyhound-Mt. Hood route between Klamath Falls, Oregon and points south thereof, on the one hand, and, on the other, The Dalles and Biggs, Oregon and points on Greyhound routes north and east thereof, is approximately 116 miles shorter than via the all-Greyhound route through Portland.

Mt. Hood's routes via Bend and Burns, Oregon between Klamath Falls, on the one hand, and, on the other, Ogden, Utah and points north thereof on Greyhound's routes are approximately [964] 23 miles less than the all-Greyhound route via Reno, Nevada and Salt Lake City, Utah.

Mt. Hood's route between Klamath Falls and Portland and points north thereof via Bend, Oregon is 19 miles longer than the Greyhound route via Eugene. Mt. Hood's route along the east side of the Cascade range of mountains, coming within ten miles of the perpetually snowcapped peak of Mt. Hood is very scenic in both summer and winter. Running time over Mt. Hood's route is approximately the same as Greyhound schedules via Eugene.

V.

The routes served by Mt. Hood east and west across Oregon and north and south between Klamath Falls and The Dalles are not served by any other surface common carrier of passengers. Greyhound and Mt. Hood have long followed the practice of honoring each other's tickets, participating in joint through rates and maintaining convenient connecting schedules. Greyhound has, in the past, showed Mt. Hood's service in its schedule folders, showed its routes upon maps furnished to its agents, and allowed Mt. Hood representatives to call upon Greyhound agencies to solicit the routing of passengers over its routes.

Two through schedules were established between San Francisco and Spokane, using Mt. Hood's Klamath Falls-The Dalles route as a "bridge" between Pacific Greyhound and [965] Northwest Greyhound, which saved approximately 116 miles and as much as 5 hours compared with the all-Greyhound service via Portland. One of the two schedules was operated with a through bus under lease to Mt. Hood and driven by Mt. Hood drivers between Klamath Falls and The Dalles.

VI.

In its applications to the I.C.C. for authority to acquire and/or merge the said predecessor companies, Greyhound represented that the transactions would have no adverse effect upon other carriers. In the application to acquire U.P. Stages dba Overland Greyhound, for example, it was represented that the proposed transaction would "have no material adverse effect upon other carriers as Overland's routes will remain open to all other carriers" and that "The proposed transaction will foster and not impair carrier competition". (p. 59 of application, Exh. D)

A hearing was held at Washington, D.C. upon said application. Mt. Hood's manager appeared with counsel in opposition and expressed the fear that, after consummation, the Greyhound Corporation would engage in practices detrimental to Mt. Hood and the bus riding public. Witnesses for the applicants represented as follows:

> "It would have no effect on competition because it would not change our relations with any of our connections (R.J.O'Connor, General Traffic Manager, Overland System, tr 40). Counsel for the applicants said "You can take that as a commitment, because it [966] is the same statement that the executive of the Greyhound Corporation will make". (Mr. Turney, tr 43)
>
> "One of the officers of the Greyhound Corporation who had discussed it with the president of Pacific Greyhound stated that he would authorize a witness for the corporation to state that, insofar as they were concerned, they had no idea of changing the present arrangements which they have with Pacific Trailways".

He also said that similar assurance applied with respect to the then present arrangements between Mt. Hood and Northwest Greyhound (formerly Washington Motor Coach). (L.H.Ristow, Director of Traffic, The Greyhound Corp. tr. 84).

Mr. Bogan, Executive Vice President and board member of the Greyhound Corporation and all of its subsidiaries, said that he had approved the arrangement for through busses operating between San Francisco and Spokane over Mt. Hood's route between Klamath Falls and The Dalles, Oregon, and that "It will be maintained". (tr. 95)

In reliance upon these representations, Mt. Hood withdrew as a protestant in that case. (tr. 143)

Mt. Hood protested Greyhound-Control-O.C. & N. Stages (MCF 3102) and Greyhound-Control-Yahne, Inc. dba Inland Stages (MCF 3208). O.C. & N. operated south of Klamath Falls to Reno and Yahne, between Reno and Los Angeles. Mt. Hood's contention was that these acquisitions would eliminate its only possible non-competitive connection for California traffic. [967]

The examiners' report in the O.C. & N. case found that the proposed acquisition would result in "the elimination of the only independent motorbus company by Pacific Greyhound in a territory where they now have a virtual monopoly * * *" "Considering the acquisition by Pacific Greyhound of O.C. & N. alone, or in conjunction with the operation of Inland Stages, in which Pacific Greyhound already has a 3/7th interest, the examiners cannot find the transaction to be consistent with the public interest."

The Greyhound Corporation and its then subsidiary Pacific Greyhound succeeded in reversing the examiners. In their exceptions they said:

> "The Examiner has failed to review the contravening testimony of Mr. Fraley, reported upon pages 243 and 244 of the transcript. According to that testimony, the promise of Pacific Greyhound was that 'there would not be discrimination in the sale of transportation into the eastern Washington territory over the combined routes of Pacific Greyhound Lines to Klamath Falls and thence to The Dalles via the Pacific Trailways, there connecting with other carriers into the Northwest. In other words, a passenger is to have his choice of routes.' This testimony was not thereafter controverted."

The two cases were decided in a single report (50 MCC 123). The Division was apparently convinced that Mt. Hood's fears were groundless and granted those applications.

Without going into details petitioner states generally that the applications to acquire the other companies listed herein contained similar representations that they would have no adverse effect upon competition. [968]

VII.

Since accomplishing the encirclement of Mt. Hood by means of said acquisitions and mergers, Greyhound is employing practices which are the opposite of the representations made to the Commission to secure approval, as follows:

(a) Ceased showing Mt. Hood schedules in Greyhound folders while continuing to show the service of numerous other non-Greyhound lines.

(b) Discontinued the through bus operated in connection with Mt. Hood between San Francisco and Spokane.

(c) Changed its schedules between San Francisco and Klamath Falls and between Biggs, Oregon and Spokane so as to break connections with Mt. Hood

and force a delay of approximately 3 hours for any passenger seeking to use the shorter route via Mt. Hood.

(d) Caused its agents to fail or refuse to quote Mt. Hood's service and fares to inquiring prospective passengers, even when the Mt. Hood route is substantially shorter; the joint Greyhound-Mt. Hood service is substantially faster, and the fares lower than an all-Greyhound route.

(e) Caused its agents to quote Mt. Hood service in an unfavorable light, or in an inaccurate manner, to inquiring prospective passengers who specifically request information on Mt. Hood service.

(f) Discontinued showing Mt. Hood's connecting routes upon its maps while continuing to show the connecting routes of numerous other non-Greyhound carriers.

(g) Requested Mt. Hood to discontinue calling upon Greyhound agencies.

(h) Refused to establish joint through rates. [969]

(i) At Greyhound depots also occupied by Mt. Hood it discriminates against Mt. Hood by refusing to announce over its speaker systems or to show upon its schedule boards Mt. Hood's departures for points which can be reached via an all-Greyhound route, or to impartially inform prospective passengers inquiring, over the phone or over the counter, of Mt. Hood's service and fares to such points.

(j) At commission agencies which sell both Greyhound and Mt. Hood tickets where, because of its vastly greater coverage and correspondingly greater sales possibilities for the agent, Greyhound is in a position to dictate and exert pressure, it influences such agents to favor Greyhound in the quoting of service, display of advertising, and in other respects.

VIII.

Your petitioner believes that the practices alleged in sub paragraphs (a) to (j), paragraph VII, supra, represent in the aggregate a purpose on the part of Greyhound to either drive Mt. Hood out of business or to weaken it to a point where it will be forced to sell at a sacrifice figure far below what would have been reasonable based upon past earnings. Contributing reasons for the said Greyhound practices are ascribed as follows:

(1) Greyhound's then president, Mr. Frailey, in 1961 discussed with Mt. Hood's management the matter of Greyhound purchasing Mt. Hood's north-south route between Klamath Falls and The Dalles and Biggs, Oregon. The proposal was rejected by Mt. Hood's management for the reason that such a sale would give Greyhound a route from Portland into Central Oregon in competition for Mt. Hood's passenger, express and charter business in an area so sparsely populated that it could not support such compe- [970] tition. The certain result would be the collapse of the balance of Mt. Hood's system. A further probable result of such a sale would be the loss to Continental Pacific Trailways (formerly West Coast Bus Lines) of a substantial volume of business, interlined at Portland, which loss would seriously jeopardize that company's already marginal operations and, if that line were also to be abandoned, there would be no Trailways service in the entire Pacific Northwest, north of San Francisco and west of Salt Lake City.

(2) On November 29, 1962 Greyhound applied to the Public Utilities Commissioner of Oregon for authority to abandon service over certain routes in Oregon and concurrently, by prearrangement with Greyhound, a Mr. Houck, dba Valley Stages, applied for the routes which Greyhound wanted to

abandon. On December 14, 1962 Mt. Hood also applied for that same authority, both to the Interstate Commerce Commission and to the Oregon Commissioner. Greyhound thereupon dismissed its application to abandon and protested both of Mt. Hood's applications. Mr. Houck, at the same time, dismissed his application. Mt. Hood's applications, as amended, were for authority to extend 11 miles west from Albany, Oregon to Corvallis and north from Eugene, Oregon to Corvallis.

Greyhound's then president, Mr. Frailey, by telephone calls and a letter to officers of Mt. Hood, thereafter urged that Mt. Hood should dismiss its applications. The president of Western Greyhound Division, Mr. Thomas of San Francisco, also made the same request. These requests, as worded, contained the veiled threat that, unless the applications were dismissed, relations between Mt. Hood and Greyhound would be adversely affected with serious consequences for Mt. Hood. Mt. Hood did not dismiss either application and has been granted a certificate of public convenience and necessity for the interstate service. (M.C. 70947, Sub 18). The Public Utilities Commissioner of Oregon denied the intrastate application for a permit and Mt. Hood presently has pending in the Circuit Court of Benton County, Oregon a suit to set aside the Commissioner's order. [971]

(3) Mt. Hood has, in other ways, refused to submit to dictation by Greyhound and thereby incurred the displeasure of Greyhound; for example, by voting against joint line fare increases proposed by Greyhound in numerous cases and by refusing Greyhound's request for an increase from 10% to 15% commission to Greyhound on interline sales by Greyhound.

IX.

Mt. Hood's revenues from traffic interlined with Greyhound are down 70% in October, 1964, as compared with October, 1963. Mt. Hood, as a result, has been compelled to reduce service over its routes causing inconvenience to the communities affected and causing a diversion of prospective passengers to private transportation, both interstate and intrastate. The loss of both interline and local traffic is seriously impairing Mt. Hood's ability to continue rendering a first-class convenient service over its routes. Most of the communities affected have no other common carrier passenger service of any kind.

X.

By means of the acquisitions herein listed, and others, The Greyhound Corporation has attained a position of unparalled dominance in the intercity scheduled motor bus business in the Pacific Region as shown by the following figures from the Commissions Bureau of Transport Economics and Statistics on Class 1 Motor Carriers of Passengers, 1963: [972]

	Revenues	Per Cent of Pacific Region Total
Greyhound	$113,266,659	96.1
Mt. Hood	1,294,904	1.1
Las Vegas-Tonopah-Reno	813,539	.69
Continental-Pacific	768,051	.65
Orange Belt Stages	554,871	.47
Peerless Stages	490.128	.41
Sun Valley Bus Lines	337,265	.28
Citizen Auto Stage Co.	223,749	.19
Santa Fe Tpn.	126,622	.11
Total Pacific Region,	$117,875,788	100.00

Greyhound's monopoly over most of the main routes in the Pacific Northwest gives it a traffic originating advantage which, if unrestrained, and unfairly used, will enable it to starve out Mt. Hood.

XI.

The certificates reissued to Greyhound in the hereinbefore listed acquisitions are all "subject, however, to such terms, conditions and limitations as are now, or may hereafter be, attached to the exercise of the privileges herein granted to the said carrier", and Part I Section 5(9) of the Act gives the Commission specific authority to make such supplemental *orders* "as it may deem necessary or appropriate" in acquisition cases.

Your petitioner respectfully requests that all of the said proceedings be reopened and assigned for further hearing to receive evidence supporting the allegations herein contained and which, your petitioner believes, will justify the issuance of a general supplemental order which will have the effect of prohibiting the discriminatory and destructive competitive [973] practices hereinbefore described; requiring restoration of usable joint-line schedules between points south of Klamath Falls, on the one hand, and, on the other, points north and east of The Dalles and Biggs, Oregon; and otherwise specifically enforcing the promises, representations and assurances relied upon by the Commission in approving the said acquisitions.

Dated at Portland, Oregon
December 1, 1964.

MT. HOOD STAGES, INC.
dba Pacific Trailways
/s/ By: WILLIAM A. NISKANEN
William A. Niskanen
Vice President and Manager
1048 Bond Street
Bend, Oregon
/s/ DONALD A. SCHAFER
Donald A. Schafer
Attorney at Law
12321 S.E. Evergreen Highway
Vancouver, Washington [974]

[Verification, Certificate of Service and Exhibits omitted in printing] [975]

Before The

Interstate Commerce Commission

In the Matter of:

THE GREYHOUND CORPORATION - CONTROL AND MERGER - INTERSTATE TRANSIT LINES, ET AL	Docket No. MC-F-5190
THE GREYHOUND CORPORATION - CONTROL; PACIFIC GREYHOUND LINES - CONTROL AND MERGER - O. C. AND N. STAGES, INC.	Docket No. MC-F-3102
THE GREYHOUND CORPORATION - CONTROL; PACIFIC GREYHOUND LINES - CONTROL AND MERGER - M. C. YAHNE, INC., d/b/a INLAND STAGES	Docket No. MC-F-3208
THE GREYHOUND CORPORATION - CONTROL; PACIFIC GREYHOUND LINES - CONTROL - OREGON MOTOR STAGES	Docket No. MC-F-5403
THE GREYHOUND CORPORATION - CONTROL WASHINGTON MOTOR COACH COMPANY, INC.	Docket No. MC-F-3295
THE GREYHOUND CORPORATION - CONTROL - NORTH COAST TRANSPORTATION COMPANY	Docket No. MC-F-3687
THE GREYHOUND CORPORATION - PURCHASE - B. C. MOTOR TRANSPORTATION, LTD.	Docket No. MC-F-5534
THE GREYHOUND CORPORATION - MERGER - PACIFIC GREYHOUND LINES; CONTROL - CALIFORNIA PARLOR CAR TOURS COMPANY	Docket No. MC-F-5733

PETITION OF UNITED STATES OF AMERICA FOR LEAVE TO INTERVENE

The United States of America by the undersigned, respectfully represents that it has an interest in the proceedings captioned [2266] above and petitions the Commission for leave to intervene in said proceedings and to participate therein as a party thereto. The United States believes it to be of importance that the Commission set the petition of

Mt. Hood Stages, Inc. and reply of the Greyhound Corporation for hearing and that the Commission proceed to decision thereon as expeditiously as possible. As ground for this petition the United States states as follows:

1. The allegations of the petition of Mt. Hood Stages, Inc. make a serious charge: that Greyhound has been permitted through the series of acquisitions the Commission approved in these proceedings to extend its system in all directions around Mt. Hood; that Greyhound has now begun to route around Mt. Hood over all Greyhound routes traffic which it used to interchange with Mt. Hood or handle in through buses over shorter and quicker routes and to engage in numerous other acts and practices which as they are described in Mt. Hood's petition (pp. 8-9) have in the aggregate the appearance of a studied effort to force Mt. Hood out of business; and that such acts and practices are contrary to assurances given by Greyhound in the acquisition proceedings that such acquisitions would not adversely affect the public or other carriers, and specifically Mt. Hood, because there would be no [2267] change in Greyhound's relations with competing carriers.[1]

Greyhound's reply (pp. 21-24) in turn, freely admits certain of Mt. Hood's allegations but categorically denies others. We have no way of knowing whether those of Mt. Hood's allegations which Greyhound denies are true or false; resolution of such controversies is a typical function

1. In an amendment to its petition Mt. Hood states that for October, 1964, the first full month after Greyhound's termination of the San Francisco-Spokane through bus service, its revenues from traffic interlined with Greyhound are down 70 percent by comparison with October 1963. Depending of course on the relative importance of interline revenue to total revenue such a drop could make the difference between overall profit or loss. But the amendment also states that as a result of this drop Mr. Hood has also had to curtail local service as well, even though most of the communities affected have no other common carrier services.

of a hearing. We do know that when Greyhound asked the Commission to approve the acquisitions, responsible Greyhound officials repeatedly gave the Commission the assurances Mt. Hood details (petition, pp. 5-7); those assurances are not consistent with the various acts Mt. Hood now alleges. Mt. Hood's grave allegations, whether true or false, as well as Greyhound's answer raise issues too serious and important to be disposed of summarily without a full adversary hearing in which allegation and denial can be put to the test of proof and cross-examination. Certainly Greyhound [2268] deserves the opportunity to demonstrate, by evidence more compelling than mere denial, either that Mt. Hood's allegations are false or that the acts and practices Mt. Hood has alleged are not motivated by a desire to destroy a small competitor and cannot have that effect.

2. Greyhound's reply characterizes Mt. Hood's petition as complaining principally if not exclusively of Greyhound having discontinued the through bus service Greyhound maintained for many years from San Francisco to Spokane with Mt. Hood as the intermediate or bridge carrier from Klamath Falls to The Dalles. (Reply, pp. 5, 11-12, 16, 18-19, 21-22). We do not read Mt. Hood's petition as so limited. Mt. Hood appears to be complaining of a developing pattern of hostile and harmful acts on the part of Greyhound over the recent past, including among numerous others Greyhound's termination of this service.

3. We believe Mt. Hood's petition raises no problems in the nature of laches. We have no doubt, for example, that if Greyhound immediately after the Commission authorized any particular acquisition had discontinued the San Francisco-Spokane through bus in the face of explicit assurance it would not do so, or had taken other steps of the kind Mt. Hood now alleges, the Commission would have promptly

canceled or modified its approvals. If anything, the need for sharp surveillance of any abuse of the power these [2269] acquisitions have given Greyhound and for prompt action to correct any such abuse has become more important as Greyhound's encirclement of Mt. Hood has become more complete with each successive acquisition; Mt. Hood, with each successive loss of an independent connection to Greyhound, has necessarily become increasingly vulnerable to attack by Greyhound and increasingly dependent upon Greyhound for survival.[2]

4. Mt. Hood's petition, and particularly Greyhound's reply, raise issues of primary jurisdiction in the Commission to grant or withhold at least some of the relief Mt. Hood seeks, which a decision by the Commission would assist in defining and clarifying. Greyhound's reply (p. 17), for example, quotes a passage from *Carolina Coach Co.-Control and Merger,* 59 M.C.C. 681 (at p. 693), for the proposition that the Commission has no power to order restoration of the San Francisco-Spokane through bus service. We think the Commission did not meet or decide that issue there and that the issue is still open; indeed the Commission, immediately after the passage Greyhound's reply quotes, intimated that but for the offer of Carolina, the survivor of the merger, to continue [2270] a through bus service comparable to that provided by the merged company, it would have ordered continuation of the through bus. In the present situation the Commission could make a determination of the scope of its jurisdiction over through bus services, either under its broad powers under section 216 or its visitorial powers under section 5(9), that would be mean-

2. Certainly the 1947 antitrust decree in *United States v. Pacific Greyhound Lines et al,* (C.A. 25267-5; D.C.N.D. Cal.), which is as old as the oldest of the acquisitions in question here, is open to amendment despite its age.

ingful and not academic; if the evidence supports Mt. Hood's other allegations of predatory conduct on the part of Greyhound it could conceivably save an independent carrier from extinction at the hands of an infinitely more powerful rival. Similarly Mt. Hood's companion complaints, that Greyhound refuses to establish joint rates and has revised other schedules so that passengers who desire to use the shorter and quicker Greyhound-Mt. Hood interchange service must wait for three hours for arrival of the connecting Greyhound or Mt. Hood bus, certainly should be heard and determined. As Mt. Hood's petition alleges, in effect, that these acts by Greyhound are part of a pattern of conduct constituting as a whole the reason why the acquisition proceedings should be reopened, we think it would only hamper the process of decision to remit each Mt. Hood allegation to a separate proceeding under some particular section [2271] of the Interstate Commerce Act to which the allegation could be related.[3]

5. Behind the immediate issues before the Commission are further issues of applicability of the antitrust laws. The Commission's approvals of the acquisitions relieved Grey-

3. It would appear from current issues of Russell's Official Bus Guide that passengers for Spokane on the Mt. Hood bus which leaves Klamath Falls at 4:00 P.M., 10 minutes after Greyhound's arrival at 3:50 P.M., must wait at The Dalles from arrival at 10:50 P.M. until departure of the Greyhound bus for Spokane at 1:49 A.M. Similarly San Francisco-bound passengers on the Mt. Hood bus which leaves Biggs at 3:00 P.M., 10 minutes after Greyhound's arrival at 2:50 P.M., must wait at Klamath Falls, where it arrives at 9:10 P.M. until Greyhound's departure at 11:50 P.M. On other runs the wait is reversed. Greyhound, southbound, arrives at The Dalles at 4:15 A.M. Mt. Hood departs at 7:00 A.M. and arrives at Klamath Falls at 1:55 P.M. to connect with Greyhound's departure at 2:10 P.M. Greyhound, northbound, arrives at Klamath Falls at 5:45 A.M. Mt. Hood departs at 8:15 A.M. and arrives at Biggs at 2:50 P.M. to connect with Greyhound's departure at 3:05 P.M. Mt. Hood cannot make up the delay in any of these instances, it can only shift the delay to the other end of its run.

hound and its officials from accountability under these laws only to the extent necessary to put the acquisitions into effect. While actions taken to give effect to the acquisitions are completely immune, exercise of economic power the acquisitions conferred so as to isolate and destroy a competitor is not. If Mt. Hood can establish its allegations, it is desirable that it have the [2272] opportunity to do so and also that the Commission determine its course as promptly as possible. For if it then appears that the Commission lacks jurisdiction to dispose of Mt. Hood's complaint, in whole or in part, Mt. Hood, remitted to another forum, may find relief elsewhere illusory if it comes too late to be effective.

Respectfully submitted,
/s/ WILLIAM H. ORRICK, JR.
William H. Orrick, Jr.
Assistant Attorney General

/s/ JOSEPH J. SAUNDERS
Joseph J. Saunders
Attorney, Department of Justice

/s/ JOHN H. DOUGHERTY
John H. Dougherty
Attorney, Department of Justice

December 14, 1964 [2273]

[Certificate of Service omitted in printing] [2274]

SERVICE DATE
JUNE 4, 1965

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D. C., on the 27th day of May, A. D. 1965.

No. MC-F-9136

MT. HOOD STAGES, INC., PETITION FOR MODIFICATION—GREYHOUND MERGERS (WESTERN DIVISION)

There being under consideration the following pleadings in the above-entitled matter:

1. Petition of Mt. Hood Stages, Inc., doing business as Pacific Trailways, of Bend, Oregon, dated October 7, 1964, as amended December 1, 1964, for an order reopening certain proceedings under section 5 of the Interstate Commerce Act, involving The Greyhound Corporation and other companies which are now a part of Greyhound Lines, Inc.;
2. Petition of National Trailways Bus System, dated October 29, 1964, for leave to intervene in support of petitioner;
3. Replies of The Greyhound Corporation, dated November 6, 1964, and December 18, 1964, to the above-described petitions and amendment;
4. Petition by the United States Department of Justice, dated December 14, 1964, for leave to intervene;
5. Reply of The Greyhound Corporation, dated December 23, 1964, to the above-described petition;
6. Petition of the Public Utility Commissioner of Oregon, dated January 20, 1965, for leave to intervene in support of petitioner to reopen proceedings, and

motion of the said Commissioner to strike a certain portion of the reply to the amended petition;

7. Petition of the Idaho Public Utilities Commission, dated February 26, 1965, for leave to oppose or support said petition of Mt. Hood Stages, Inc.;

and good cause therefor appearing:[2275]

It is ordered, That the above-entitled matter be, and it is hereby, assigned for hearing at a time and place to be hereafter fixed, for the purpose of determining whether any supplemental order or orders should be issued under section 5(9) of the Interstate Commerce Act in any of the proceedings named in the attached appendix imposing or modifying conditions therein or an order issued under any other appropriate section of the Act in this proceeding with respect to whatever acts or facts involving violation of the Act, if any, may be proven at the said hearing.

It is further ordered, That the United States Department of Justice, Public Utility Commissioner of Oregon, Idaho Public Utilities Commission, and National Trailways Bus System, be, and they are hereby, permitted to intervene and be treated as parties to this proceeding, with the right to have notice of and to appear at the taking of testimony, produce and cross-examine witnesses and be heard on brief and oral argument, if oral argument is heard; provided, however, that the permission to intervene herein granted shall not be construed to allow intervenors to introduce evidence which will unduly broaden the issues raised in this proceeding.

It is further ordered, That the following portion of the reply, dated December 18, 1964, to the amended petition be, and it is hereby, stricken:

Page 6—Lines 5 through 9 inclusive

It is further ordered, That a copy of this order be served upon each of the parties named herein, and that a copy be filed in each of the dockets listed in the appendix hereto.

By the Commission, Division 3.

/s/ BERTHA F. ARMES
BERTHA F. ARMES,
Acting Secretary.

(SEAL) [2276]

APPENDIX

Docket Nos.		Report
MC-F-3102	The Greyhound Corp.—Control; Pacific Greyhound Lines—Control and Merger—O.C. & N. Stages, Inc.	50 M.C.C. 123
MC-F-3203	The Greyhound Corp.—Control; Pacific Greyhound Lines—Control and Merger—M. C. Yahne, Inc., doing business as Inland Stages	50 M.C.C. 123
MC-F-3295	The Greyhound Corp.—Control—Washington Motor Coach Co., Inc.	45 M.C.C. 821
MC-F-3687	The Greyhound Corp.—Control—North Coast Transportation Co.	55 M.C.C. 801
MC-F-4024	The Greyhound Corp.—Control; Pacific Greyhound Lines—Control—Oregon Motor Stages	55 M.C.C. 321
MC-F-4360	The Greyhound Corp.—Merger—Northwest Greyhound Lines, Inc., and North Coast Greyhound Lines, Inc.	56 M.C.C. 238
MC-F-5190	The Greyhound Corp.—Control and Merger—Interstate Transit Lines et al	58 M.C.C. 809
MC-F-5403	The Greyhound Corp.—Control; Pacific Greyhound Lines—Purchase (Portion)—Oregon Motor Stages	59 M.C.C. 657
MC-F-5534	The Greyhound Corp.—Purchase—B. C. Motor Transportation, Ltd.	60 M.C.C. 643
MC-F-5733	The Greyhound Corp.—Merger—Pacific Greyhound Lines; Control—California Parlor Car Tours Co.	70 M.C.C. 59
MC-F-8531	California Parlor Car Tours Co.—Pur.—The Greyhound Corp. [2277]	93 M.C.C. 392

June 4, 1965

[Certificate of Service omitted in printing] [2278] & [2279]

In the United States District Court
for the District of Oregon

Civil No. 68-374

MT. HOOD STAGES, INC. dba PACIFIC TRAILWAYS,
Plaintiff,

v.

THE GREYHOUND CORPORATION and GREYHOUND LINES, INC.,
Defendants.

COMPLAINT FOR TREBLE DAMAGES AND INJUNCTIVE RELIEF UNDER THE ANTI-TRUST AND UNFAIR COMPETITION LAWS

(JURY DEMANDED)
FIRST CAUSE OF ACTION
JURISDICTION AND VENUE

1. This complaint is filed and these proceedings are instituted against defendants pursuant to Sections 4 and 16 of the Clayton Act (15 U.S.C. §15 and § 26), being a part of the antitrust laws of the United States, for violations of such laws. The purpose of this action is to prevent and restrain continuing violations by the defendants, as hereinafter alleged, and to recover damages, as provided by law, for injuries to plaintiff's business and property within the period allowed by law for which injuries proximately resulted from defendants' violations. Defendants' violations are continuing and persist to the date of this complaint.

2. The unlawful acts and violations of law herein [1] described have been conceived, carried out, made effective and performed in major part within the above district and have affected areas in other states of the United States.

3. Plaintiff Mt. Hood Stages, Inc., doing business under the assumed name "Pacific Trailways", is a corporation

organized under the laws of Oregon, having its principal place of business in Bend, Oregon. It is primarily engaged in the operation of scheduled common carrier passenger motor bus service in both interstate and intrastate commerce in the states of Oregon, Idaho and Utah, and specifically within the District of Oregon.

4. Defendant The Greyhound Corporation (hereinafter referred to as "Greyhound Corp.") is a corporation incorporated under the laws of the State of Delaware, having its principal place of business in the City of Chicago, Illinois. It is at present a holding company, owning, among other assets, all of the issued and outstanding capital stock of defendant Greyhound Lines, Inc. From 1959, the exact time not now being known to plaintiff, until 1964, the exact time not now being known to plaintiff, Greyhound Corp. was engaged in the operation of scheduled common carrier passenger motor bus service in interstate and intrastate commerce in all states in the United States except Alaska and Hawaii, and specifically within the District of Oregon. During the year 1964, the exact time not now being known to plaintiff, Greyhound Corp. transferred substantially all of its motor carrier operating rights and properties to its wholly-owned subsidiary, the defendant Greyhound Lines, Inc.

5. Defendant Greyhound Lines, Inc., is a corporation incorporated under the laws of the State of California, having its principal place of business in the City of Chicago, Illinois. Commencing in 1964, the exact time not now being known to plaintiff, and continuing until the present time, Greyhound Lines has been engaged in the operation of scheduled common carrier passenger [2] motor bus service in interstate and intrastate commerce in all states in the

United States except Alaska and Hawaii and specifically within the District of Oregon.

THE MARKET INVOLVED

6. The market with respect to which the violations of the antitrust laws alleged herein took place is the scheduled common carrier passenger motor bus service market within the Western United States. Plaintiff and defendants and their predecessors have conducted, among other activities, operations in that market. Tickets for the passenger service described have been made available to the public through selling agents and outlets, many of whom are located at bus terminals. Used in aid of such sales are printed materials such as schedules and maps showing available service to prospective travelers. Often, as has been the case here, joint-line service is made available to the public. Under such a system two or more passenger carriers interconnect their routes and establish and publish joint rates, fares and charges and mutually honor tickets of other carriers involved.

DESCRIPTION OF PLAINTIFF'S BUSINESS

7. Plaintiff has operated daily scheduled service from and between various points within Oregon, Idaho and Utah, over approximately 1500 miles, using approximately 46 buses.

DESCRIPTION OF DEFENDANTS' BUSINESS

8. Defendants constitute the largest company engaged in passenger motor carriage in the United States. They control approximately 96% of all revenues earned by all Class I passenger motor carriers in the Western United States. They have possessed monopoly power by reason

of control of main routes, depots and selling agents and outlets in the Western United States. They have thereby possessed the power to eliminate or restrain the trade of plaintiff or any other competitor and have done so by the means hereinafter pleaded. [3]

INTERSTATE COMMERCE

9. The violations herein alleged have occurred in interstate commerce or substantially and directly affect interstate commerce. Defendants are interstate instrumentalities who have unlawfully used their power over interstate commerce to restrain and destroy competition in Oregon, Idaho and Utah.

VIOLATION OF THE ANTITRUST LAWS

10. Plaintiff alleges that beginning before 1947 and continuously and uninterruptedly to and including the date of filing this complaint, defendants have combined, contracted and conspired as between themselves and among their respective officers and directors to restrain and monopolize trade and commerce in the scheduled common carriage of passengers and their luggage by motor coach to, from and between points in the Western United States including Oregon, Idaho and Utah and have jointly and severally attempted to monopolize, monopolized, substantially lessened competition and tended to create a monopoly therein, all in violation of 15 U.S.C. §§ 1 and 2 (Sherman Act §§ 1 and 2), 15 U.S.C. §§ 14 and 18 (Clayton Act §§ 3 and 7.)

11. In furtherance of such violations, defendants have, among other acts, done and performed the following:

(a) Have acquired control of several formerly independent bus lines and merged them into their own system.

(b) Have obtained consent of the Interstate Commerce Commission for such acquisitions or mergers based upon the following representations and assurances each of which were not carried out with respect to plaintiff but were ignored or disregarded when it suited defendants' anti-competitive purposes:

(1) That the acquisitions or mergers would have no adverse effect upon plaintiff.

(2) That the acquired or merging companies' routes would remain open to plaintiff and other [4] carriers.

(3) That plaintiff's connections with such acquired or merging companies would remain the same after the completion of the transaction.

(4) That joint-line operations in existence at the time of such acquisitions or mergers would remain unchanged thereafter.

(5) That defendants' policy was not to route passengers circuitously but to sell the most direct route, even that of a competing line, and that defendants would not discriminate against plaintiff in the sale of transportation.

(6) That joint-line operations as well as nondiscriminatory selling of plaintiff's routes was profitable to defendants and there was no reason for plaintiff to fear diversion of traffic.

(7) That joint-routes and plaintiff's own routes would continue to show in defendants' schedule folders and maps after the mergers.

(8) That defendants would in no way discriminate against plaintiff.

(c) Have induced plaintiff to discontinue its protests to such acquisitions and mergers upon assurance by defendants that such representations would be adhered to.

(d) Are possessed of and have acquired facilities for selling bus service by reason of their over-all economic power and such acquisitions and mergers. As a result defendants have effective control of such selling agencies

and outlets in the west and throughout the United States. By use and manipulation of such selling agencies and outlets defendants have:

(1) Failed to publicize the joint-line service with plaintiff in effect prior to [5] September 1964, or to show such service on defendants' schedules.

(2) Publicized their own service routes and rates while in some instances failing to quote plaintiff's more advantageous connecting service routes and rates and in other instances quoting inaccurate and unfavorable information concerning plaintiff's connecting service, routes and rates.

(3) Failed to show plaintiff's routes on route maps.

(4) Discriminated against plaintiff in defendants' depots and stations by giving inaccurate information concerning plaintiff's service routes and rates while quoting accurately such information with respect to their own service and the service of other bus lines.

(5) Instructed defendants' selling agents to sell tickets to passengers over circuitous and more costly routes rather than to use the joint-line route or plaintiff's other routes.

(e) Have dismissed a request to abandon service when upon filing an application for such abandonment, plaintiff applied for the rights being abandoned. Thereupon, defendants protested plaintiff's application and threatened plaintiff with retaliation unless its application was dropped.

(f) Have discontinued existing joint-line through bus operations with plaintiff and have refused to enter into any such further arrangements.

(g) Have deliberately created long delays in making connections between buses of defendants and plaintiff in order to induce passengers to refrain from using plaintiff's service.

(h) By reason of extensive sales opportunities inherent [6] in defendants' extensive operations and the power

arising from them, defendants have influenced and coerced commission agents to refrain from informing the public of plaintiff's service, to misquote plaintiff's service, to divert all passengers to Greyhound routes and to prevent plaintiff from advertising in jointly occupied depots.

(i) Have refused, in depots controlled by them, to announce the arrivals and departures of plaintiff's buses, to show schedules of plaintiff or to inform the public of plaintiff's service.

(j) Have controlled sales practices of other passenger bus lines requiring them to use Greyhound tickets and to favor Greyhound routings.

(k) Have required plaintiff to spend inordinately large sums of money in regulatory proceedings which were instituted or protested as a result of defendants' anticompetitive behavior.

EFFECT OF VIOLATIONS

12. As a direct result of the violations alleged, defendants have achieved a nearly complete monopoly in the scheduled common carrier motor bus service market in Oregon, Idaho and Utah. They have virtual and complete control of routes, selling agencies and outlets and depots. Such control has been used by defendants to encircle plaintiff's routes, thus giving them the means to siphon off customers who would otherwise use plaintiff's services because of shorter time, more scenic route and lower charges. However, the public has not been aware of plaintiff's superior service available to them either as a joint-line operation or as plaintiff's sole operation because of defendants' virtual and complete control over depots, selling agencies and outlets and the distribution of printed material disseminating information concerning routes. [7]

Plaintiff's ability to remain a viable business entity has been endangered, its revenues have been substantially reduced and its capital and other funds have been debilitated. Plaintiff alleges that its management, equipment and method of operation are efficient and competitive. However, the effect of defendants' overwhelming control of the market coupled with the exercise of power arising from such control to plaintiff's detriment has deprived plaintiff of the opportunity for the normal growth of its scheduled business which it would otherwise have experienced and would now be experiencing.

FRAUDULENT CONCEALMENT

13. Plaintiff suspected prior to July 1964 that it had a claim under the antitrust or other laws for defendants' failure to quote plaintiff's services accurately or at all, to announce arrivals and departures of plaintiff's buses, to include plaintiff's services on their schedules and maps, or for defendants' policy of diversion of traffic away from plaintiff's services and to defendants' circuitous and more expensive routes and of instructing agents accordingly. However, prior to July, 1964 defendants denied such actions to plaintiff and the ICC, which actions were in effect thereby concealed in the records and minds of defendants and their officers and directors. From 1947 forward and at various times continuously until July 1964, defendants' employees told plaintiff that they were quoting plaintiff's services and rates accurately whenever such service might best suit the needs of passengers, that they were announcing plaintiff's arrivals and departures, that plaintiff's services were listed on defendants' maps and schedules and that there was no policy to divert traffic from plaintiff to defendants by not quoting or making plaintiff's services

known to the public. These material representations and denials were made with intent that plaintiff and the ICC rely thereon, were known to defendants to be untrue when made, and plaintiff and the ICC did [8] justifiably rely thereon.

DAMAGES

14. As a direct and proximate result of the violations alleged, plaintiff has been damaged in that the present and future value of its business and property has been substantially injured, its past and future profits seriously impaired, and it has suffered an immense loss of good will and reputation, all to its damage in an amount presently not known to plaintiff, but which will be proved at trial.

INJUNCTIVE RELIEF

15. Plaintiff alleges that unless this Court denies defendants their position of power and the means to exercise the same, competition will no longer exist in the relevant market. The continuing conduct of defendants will cause irreparable injury, loss and damage to plaintiff unless enjoined and restrained by the Court.

SECOND CAUSE OF ACTION FOR UNFAIR COMPETITION

1. Plaintiff is a corporation incorporated under the laws under the State of Oregon having its principal place of business in the State of Oregon and defendant The Greyhound Corporation is a corporation incorporated under the laws of the State of Delaware, having its principal place of business in a state other than the State of Oregon, and defendant Greyhound Lines, Inc. is a corporation incorporated under the laws of the State of California, having its principal place of business in a state other than the State

of Oregon. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.

2. Plaintiff realleges paragraphs 2, 3, 4, 5, 6, 7, 8, 11, 12, 13, 14 and 15 of its First Cause of Action.[9]

3. Defendants acted wilfully and maliciously and without justification for the purpose of injuring plaintiff and destroying its business. In addition to general damages as proved, plaintiff is entitled to punitive damages as proved.

THIRD CAUSE OF ACTION FOR UNFAIR COMPETITION

1. This Court has jurisdiction under 28 U.S.C. 1331 (a), 1338 (a) (b), 15 U.S.C. 1121 and 15 U.S.C. 1126 (b) (h) and (i), this being a claim for unfair competition under the laws of the United States.

2. Plaintiff realleges the allegations of paragraphs 2 and 3 of its Second Cause of Action, and 9 of its First Cause of Action and states that the foregoing conduct has been to plaintiff's irreparable damage.

WHEREFORE, plaintiff prays:

A. That the conduct of defendants as alleged to be adjudged and decreed unlawful.

B. That judgment be entered against defendants, and each of them, for treble the amount of damages suffered by plaintiff as a result of violations of the antitrust laws alleged herein and for attorney's fees and costs as required by Section 4 of the Clayton Act.

C. For injunctive relief to the extent justified by the proof.

D. For damages as proved for unfair competition and for punitive damages under its Second Cause of Action.

E. For damages as proved for unfair competition under its Third Cause of Action and costs as required thereunder,

and for injunctive relief to the extent justified by the proof. [10]

F. For other relief as the Court shall deem proper.

RIVES & SCHWAB
HERBERT M. SCHWAB
BRUCE M. HALL
DONALD A. SCHAFER

BROAD, BUSTERUD & KHOURIE
MICHAEL N. KHOURIE
J. STANLEY POTTINGER
By /s/ BRUCE M. HALL
Of Attorneys for Plaintiff [11]

F. For other relief as the Court shall deem proper.

RIVES & SCHWAB
HERBERT M. SCHWAB
BRUCE M. HALL
DONALD A. SCHAFER

BROAD, BUSTERUD & KHOURIE
MICHAEL N. KHOURIE
J. STANLEY POTTINGER
By /s/ BRUCE M. HALL
Of Attorneys for Plaintiff

Plaintiff demands trial by jury of all issues so triable in the above captioned proceedings.

RIVES & SCHWAB
HERBERT M. SCHWAB
BRUCE M. HALL
DONALD A. SCHAFER
BROAD, BUSTERUD & KHOURIE
MICHAEL N. KHOURIE
J. STANLEY POTTINGER
By /s/ BRUCE M. HALL
Of Attorneys for Plaintiff [12]

United States District Court
District of Oregon

[Title omitted in printing]

Civil No. 68-374

THIRD AMENDED COMPLAINT FOR TREBLE DAMAGES UNDER THE ANTITRUST LAWS AND FOR DAMAGES UNDER THE UNFAIR COMPETITION LAWS

(JURY DEMANDED)

FIRST CAUSE OF ACTION

Jurisdiction and Venue

(1) This Third Amended Complaint is filed and these proceedings are instituted against Defendants pursuant to sections 4 and 16 of the Clayton Act (15 USC § 26), being a part of the antitrust laws of the United States for violation of such laws. The purpose of this action is to prevent and restrain continuing violations by the Defendants as hereinafter alleged, and to recover damages, as provided by law, for injuries to Plaintiff's business and property within the period allowed by law for which injuries proximately resulted from Defendants' violations. Defendants' violations are continuing and persist to the date of this Complaint.

(2) The unlawful acts and violations of law herein described have been conceived, carried out, made effective and performed [691] in major part within the above district and have affected areas in other states of the United States.

(3) Plaintiff Mt. Hood Stages, Inc., doing business under the assumed name "Pacific Trailways", is a corporation organized under the laws of Oregon, having its principal

place of business in Bend, Oregon. It is primarily engaged in the operation of scheduled common carrier passenger motor bus service in both interstate and intrastate commerce in the states of Oregon, Idaho and Utah, and specifically within the District of Oregon.

(4) Defendant The Greyhound Corporation (hereinafter referred to as "Greyhound Corp.") is a corporation incorporated under the laws of the State of Delaware, having its principal place of business in the City of Chicago, Illinois. It is at present a holding company owning, among other assets, all of the issued and outstanding capital stock of Defendant Grayhound [sic] Lines, Inc. From 1959, the exact time not now being known to Plaintiff, Greyhound Corp. was engaged in the operation of scheduled common carrier passenger motor bus service in interstate and intrastate commerce in all states in the United States except Alaska and Hawaii, and specifically within the District of Oregon. During the year 1964, the exact time not now being known to Plaintiff, Greyhound Corp. transferred substantially all of its motor carrier operating rights and properties to its wholly-owned subsidiary, the Defendant Greyhound Lines, Inc.

(5) Defendant Greyhound Lines, Inc. is a corporation incorporated under the laws of the State of California, having its principal place of business in the City of Chicago, Illinois. Commencing in 1964, the exact time not now being known to Plaintiff, and continuing until the present time, Greyhound Lines, Inc. has been engaged in the operation of scheduled common carrier passenger motor bus service in interstate and intrastate commerce in all states in the United States except Alaska and Hawaii, and specifically within the District of Oregon. [692]

The Market Involved

(6) The market with respect to which the violations of the antitrust laws alleged herein took place is the scheduled common carrier passenger motor bus service market within the Western United States. Plaintiff and Defendants and their predecessors have conducted, among other activities, operations in that market. Tickets for the passenger services described have been made available to the public through selling agents and outlets, many of whom are located at bus terminals. Used in aid of such sales are printed materials such as schedules and maps showing available service to prospective travelers. Often, as has been the case here, joint-like [sic] service is made available to the public. Under such a system, two or more passenger carriers interconnect their routes and establish and publish joint rates, fares and charges and mutually honor tickets of other carriers involved.

Description of Plaintiff's Business

(7) Plaintiff has operated daily scheduled service from and between various points within Oregon, Idaho and Utah, over approximately 1,500 miles, using approximately 46 buses.

Description of Defendant's Business

(8) Defendants constitute the largest company engaged in passenger motor carriage in the United States. They control approximately 96% of all revenues earned by all Class I passenger motor carriers in the Western United States. They have possessed monopoly power by reason of control of main routes, depots and selling agents and outlets in the Western United States. They have thereby pos-

sessed the power to eliminate or restrain the trade of Plaintiff or any other competitor and have done so by means hereinafter pleaded.

Interstate Commerce

(9) The violations herein alleged have occurred in interstate commerce or substantially and directly affect interstate commerce. Defendants are interstate instrumentalities who have unlawfully used their power over interstate commerce to restrain and destroy [693] competition in Oregon, Idaho and Utah.

Violation of the Antitrust Laws

(10) Plaintiff alleges that beginning before 1947 and continuously and uninterruptedly to and including the date of filing this Complaint, Defendants have combined, contracted and conspired as between themselves, among their respective officers and directors, and at various times thereafter with certain officials of the Amalgamated Transit Union and with Defendants' numerous ticket selling agencies, to restrain and monopolize trade and commerce in the scheduled common carriage of passengers and their luggage by motor coach to, from and between points in the Western United States including Oregon, Idaho and Utah and have jointly and severally attempted to monopolize, monopolized substantially lessened competition and tended to create a monopoly there all in violation of 15 USC §§ 1 and 2 (Sherman Act §§ 1 and 2).

(11) In pursuit of said combination, contract and conspiracy and with the motive and intent of substantially lessening competition and achieving monopoly by means violative of said laws, defendants have, jointly and severally, beginning before 1947 to and including the date of

filing this Third Amended Complaint, among other acts, done and performed the following:

(a) Have acquired control of several formerly independent bus lines, selling agents, outlets and depots with which Plaintiff had enjoyed beneficial economic relationships and merged them into their own system so as to almost completely encircle Plaintiff's operations with operations dominated by Defendant.

(b) Have sought and obtained consent of the Interstate Commerce Commission for such encircling acquisitions or mergers based upon the following representations and assurances, each of which relied upon by Plaintiff and each of which were not carried out with respect to Plaintiff but were ignored or disregarded when it suited Defendants' anticompetitive purposes:

(1) That the acquisitions or mergers would have [694] no adverse effect upon Plaintiff.

(2) That the acquired or merged companies' routes would remain open to Plaintiff and other carriers.

(3) That Plaintiff's connections with such acquired or merging companies would remain the same after the completion of the transaction.

(4) That joint-line operations in existence at the time of such acquisitions or mergers would remain unchanged thereafter.

(5) That Defendants' policy was not to route passengers circuitously but to sell the most direct route, even that of a competing line, and that Defendants would not discriminate against Plaintiff in the sale of transportation.

(6) That joint-line operations as well as nondiscriminatory selling of Plaintiff's routes was profitable to Defendants and there was no reason for Plaintiff to fear diversion of traffic.

(7) That joint-routes and Plaintiff's own routes would continue to show in Defendants' schedule folders and maps after the mergers.

(8) That Defendants would in no way discriminate or cause selling agents and other outlets to discriminate against Plaintiff.

(e) Have induced Plaintiff to discontinue its protests to such acquisitions and mergers upon assurance by Defendants that such representations would be adhered to.

(d) Are possessed of and have acquired facilities for selling bus service by reason of their overall economic power and position of encirclement of Plaintiff resulting from such acquisitions and mergers. As a result Defendants have effective control of such [695] selling agencies and outlets in the west and throughout the United States. By use and manipulation of such selling agencies and outlets Defendants have:

(1) Failed to publicize the joint-line service with Plaintiff in effect prior to September, 1964, or to show such service on Defendants' schedules.

(2) Publicized their own service routes and rates while in some instances failing to quote Plaintiff's more advantageous connecting service routes and rates and in other instances quoting inaccurate and unfavorable information concerning Plaintiff's connecting service, routes and rates.

(3) Failed to show Plaintiff's routes on route maps.

(4) Discriminated against Plaintiff in Defendants' depots and stations by giving inaccurate information concerning Plaintiff's service routes and rates while quoting accurately such information with respect to their own service and the service of other bus lines.

(5) Instructed Defendants' selling agents to sell tickets to passengers over circuitous and more costly routes rather than to use the joint-line route or Plaintiff's other routes.

(e) Have dismissed a request to abandon service when upon filing an application for such abandonment, Plaintiff applied for the rights being abandoned. Thereupon, Defendants protested Plaintiff's application and threatened Plaintiff with retaliation unless its application was dropped.

(f) Have discontinued existing joint-line through bus operations with Plaintiff and have refused to enter into any such further arrangements. [696]

(g) Have deliberately created long delays in making connections between buses of Defendants and Plaintiff in order to induce passengers to refrain from using Plaintiff's service.

(h) By reason of extensive sales opportunities inherent in Defendants' extensive operations and the power arising from them, Defendants have influenced and coerced commission agents to refrain from informing the public of Plaintiff's service, to misquote Plaintiff's service, to divert all passengers to Greyhound routes and to prevent Plaintiff from advertising in jointly occupied depots.

(i) Have refused in depots controlled by them to announce the arrivals and departures of Plaintiff's buses, to show schedules of Plaintiff or to inform the public of Plaintiff's service.

(j) Have controlled sales practices of other passenger bus lines requiring them to use Greyhound tickets and to favor Greyhound routings.

(k) Have required Plaintiff to spend inordinately large sums of money in regulatory proceedings which were instituted or protested as a result of Defendants' anticompetitive behavior.

(l) Have collaborated with certain officials of the Amalgamated Transit Union to induce said union to make arbitrary and oppressive wage demands upon Plaintiff, thereby

causing a strike and work stoppage of Plaintiff's operations from May 15 to July 6, 1964.

Effect of Violations

(12) As a direct result of the violations alleged, Defendants have achieved a nearly complete monopoly in the scheduled common carrier motor bus service market in Oregon, Idaho and Utah. They have virtual and complete control of routes, selling agencies and outlets and depots. Such control has been used by Defendants.

Fraudulent Concealment

(13) Plaintiff suspected prior to July, 1964 that it had a claim under the antitrust or other laws for Defendants' failure to quote Plaintiff's services accurately or at all, to announce arrivals [697] and departures of Plaintiff's buses, to include Plaintiff's services on their schedules and maps, or for Defendants' policy of diversion of traffic away from Plaintiff's services and to Defendants' circuitous and more expensive routes and of instructing agents accordingly. However, Defendants have persistently denied such practices to Plaintiff and the ICC and have concealed from Plaintiff the fact that they had actively colluded and collaborated with their ticket selling agencies to engage in those practices and have concealed from Plaintiff their collusion with officials of the Amalgamated Transit Union as alleged herein, which collusive practices were in effect thereby concealed in the records and minds of Defendants and their officers and directors. At all times since the inception of the conspiracy alleged herein, Defendants' employees told Plaintiff that Defendants and their ticket agents were quoting Plaintiff's services and rates accurately whenever

such service might best suit the needs of passengers; that they were announcing Plaintiff's arrivals and departures; that Plaintiff's services were listed on Defendants' maps and schedules; that there was no policy to divert traffic from Plaintiff to Defendants by not quoting or making Plaintiff's services known to the public; and that instructions had been given by Defendants to their ticket agents to sell passenger tickets via the most direct route even though it was via the more direct route of another carrier. These material representations and denials were made with the intention that Plaintiff and the ICC rely thereon, were known to Defendants to be untrue when made, and Plaintiff and the ICC did justifiably rely thereon. Defendants thus deliberately and fradulently [sic] concealed from Plaintiff their collusive and conspiratorial activities as alleged herein.

Damages

(14) As a direct and proximate result of the violations alleged, Plaintiff has been damaged in that the present and future value of its business and property has been substantially injured, its past and future profits seriously impaired, and it has suffered an immense [698] loss of goodwill and reputation, all to its damage in an amount presently not known to Plaintiff, but which will be proved at trial.

SECOND CAUSE OF ACTION
FOR UNFAIR COMPETITION

(1) Plaintiff is a corporation incorporated under the laws under the State of Oregon having its principal place of business in the State of Oregon and Defendant The Greyhound Corporation is a corporation incorporated under the

laws of the State of Delaware, having its principal place of business in a state other than the State of Oregon, and Defendant Greyhound Lines, Inc. is a corporation incorporated under the laws of the State of California, having its principal place of business in a state other than the State of Oregon. The matter in controversy exceeds, exclusive of interest and costs, the sum of $10,000.

(2) Plaintiff realleges paragraphs 2, 3, 4, 5, 6, 7, 8, 11, 12, 13 and 14 of its First Cause of Action.

(3) Defendants acted willfully and maliciously and without justification for the purpose of injuring Plaintiff and destroying its business. In addition to general damages as proved, Plaintiff is entitled to punitive damages as proved.

THIRD CAUSE OF ACTION FOR UNFAIR COMPETITION

(1) This Court has jurisdiction under 28 USC 1331 (a), 1338(a)(b), 15 USC 1121 and 15 USC 1126(b), (h) and (i), this being a claim for unfair competition under the laws of the United States.

(2) Plaintiff realleges the allegations of paragraphs 2 and 3 of its Second Cause of Action, and 9 of its First Cause of Action.

WHEREFORE, Plaintiff prays:

(A) That the conduct of Defendants as alleged be adjudged and decreed unlawful.

(B) That judgment be entered against Defendants, and each [699] of them, for treble the amount of damages suffered by Plaintiff as a result of violations of the antitrust laws alleged herein and for attorney's fees and costs as required by Section 4 of the Clayton Act.

(C) For damages as proved for unfair competition and for punitive damages under its Second Cause of Action.

(D) For damages as proved for unfair competition under its Third Cause of Action and costs as required thereunder.

(E) For other relief as the Court shall deem proper.

RIVES, BONYHADI, HALL & EPSTEIN
BRUCE M. HALL
GEORGE K. MEIER III

BROAD, KHOURIE & SCHULZ
MICHAEL N. KHOURIE
EUGENE C. CREW
By /s/ BRUCE M. HALL
Of Attorneys for Plaintiff

Plaintiff demands trial by jury of all issues so triable in the above-captioned proceedings.

RIVES, BONYHADI, HALL & EPSTEIN
BRUCE M. HALL
GEORGE K. MEIER III

BROAD, KHOURIE & SCHULZ
MICHAEL N. KHOURIE
EUGENE C. CREW
By /s/ BRUCE M. HALL
Of Attorneys for Plaintiff [700]

[Certificate of service omitted in printing] [701]

United States District Court
for the District of Oregon

[Title omitted in printing]

Civil No. 68-374

ANSWER OF DEFENDANT GREYHOUND LINES, INC. TO THIRD AMENDED COMPLAINT

Defendant Greyhound Lines, Inc. answers plaintiff's third amended complaint as follows:

DEFENSES TO FIRST CAUSE OF ACTION

FIRST DEFENSE TO FIRST CAUSE OF ACTION

Plaintiff's first cause of action does not state a claim against this answering defendant on which relief can be granted.

SECOND DEFENSE TO FIRST CAUSE OF ACTION

1. Answering paragraph 1, defendant Greyhound Lines, Inc. admits that this action is instituted under § 4 of the Clayton Act (15 USC § 15). Defendant denies the remainder of paragraph 1.

2. Defendant denies paragraph 2.

3. Defendant admits paragraph 3. [702]

4. Defendant admits paragraph 4, except it avers that defendant The Greyhound Corporation discontinued the operation of scheduled common carrier passenger motor bus service on December 31, 1963, at which time it transferred its motor carrier operating rights and properties to this defendant.

5. Defendant admits paragraph 5, except it avers that it has engaged in the operation of scheduled common carrier passenger motor bus service since January 1, 1964.

6. Defendant admits paragraph 6, except it denies that it has violated the antitrust laws and further denies that the market to which plaintiff's allegations refer is the scheduled common carrier passenger motor bus service market within the Western United States.

7. Defendant avers that it is without knowledge or information sufficient to form a belief as to the truth of averments contained in paragraph 7, except that defendant admits that plaintiff has held itself out to provide scheduled service from and between various points within Oregon, Idaho and Utah.

8. Answering paragraph 8, defendant admits it is the largest company engaged in passenger motor carriage in the United States. Defendant denies the remainder of paragraph 8.

9. Defendant denies paragraph 9.

10. Defendant denies paragraph 10.

11. Defendant denies paragraph 11, except: Defendant admits defendant The Greyhound Corporation acquired control of several formerly independent bus lines and merged them into its system and obtained the consent of the Interstate Commerce Commission for such acquisitions and mergers; defendant admits it has facilities for selling bus service; as to allegation (e), defendant admits that defendant The Greyhound Corporation dismissed a request to abandon service, that plaintiff applied for the rights being abandoned, and that defendant The Greyhound Corporation filed a protest against [703] plaintiff's application, and defendant admits it discontinued existing joint-line through bus operations with plaintiff for a period of time but has reinstituted the same.

12. Defendant denies paragraph 12.

13. Defendant denies paragraph 13, except that defendant admits and avers that plaintiff had knowledge and information with respect to the activities, actions, practices and policies of Defendant, and of Greyhound agents, to the extent applicable concerning the quoting of Plaintiff's services, inclusion of Plaintiff's services on schedules and maps, routing of traffic and instructions to agents.

14. Defendant denies paragraph 14.

THIRD DEFENSE TO FIRST CAUSE OF ACTION

All or part of plaintiff's first cause of action is barred by § 4B of the Clayton Act, 15 USC § 15B.

FOURTH DEFENSE TO FIRST CAUSE OF ACTION

The acquisitions of control and mergers of bus lines, selling agents, outlets and depots referred to in plaintiff's third amended complaint were authorized and approved by the Interstate Commerce Commission under § 5(2) of the Interstate Commerce Act, 49 USC § 5(2), and this answering defendant is relieved from the operation of the antitrust laws and all state laws insofar as necessary to carry the same into effect and to hold, maintain and operate said properties and to exercise any control and franchises thereby acquired under § 5(11) of the Interstate Commerce Act, 49 USC § 5(11).

DEFENSES TO PLAINTIFF'S SECOND CAUSE OF ACTION

FIRST DEFENSE TO SECOND CAUSE OF ACTION

Plaintiff's second cause of action does not state a claim against this answering defendant on which relief can be granted.

SECOND DEFENSE TO SECOND CAUSE OF ACTION

1. Defendant Greyhound Lines, Inc. admits paragraph 1.

2. Answering paragraph 2, defendant realleges the admissions, denials and averments in its *Second Defense to First Cause of Action* [704] as to paragraphs 2, 3, 4, 5, 6, 7, 8, 11, 12, 13 and 14 of plaintiff's first cause of action.

3. Defendant denies paragraph 3.

THIRD DEFENSE TO SECOND CAUSE OF ACTION

Part or all of plaintiff's second cause of action is barred by the applicable statute of limitations.

FOURTH DEFENSE TO SECOND CAUSE OF ACTION

Defendant realleges its fourth defense to plaintiff's first cause of action.

DEFENSES TO PLAINTIFF'S THIRD CAUSE OF ACTION

FIRST DEFENSE TO THIRD CAUSE OF ACTION

Plaintiff's third cause of action does not state a claim against this answering defendant on which relief can be granted.

SECOND DEFENSE TO THIRD CAUSE OF ACTION

1. Answering paragraph 1, defendant Greyhound Lines, Inc. denies that this court has jurisdiction or that plaintiff's third cause of action presents a Federal question or that any cause of action exists for unfair competition under the laws of the United States.

2. Answering paragraph 2, defendant realleges the admissions, denials and averments in its *Second Defense to*

First Cause of Action and in paragraphs 2 and 3 of its *Second Defense to Second Cause of Action* insofar as the same respond to averments incorporated by reference in plaintiff's Third Cause of Action. Defendant denies that any conduct of defendant has caused plaintiff irreparable damage.

THIRD DEFENSE TO THIRD CAUSE OF ACTION

Part or all of plaintiff's second cause of action is barred by the applicable statute of limitations.

FOURTH DEFENSE TO THIRD CAUSE OF ACTION

Defendant realleges its fourth defense to plaintiff's [705] first cause of action.

WHEREFORE, defendant Greyhound Lines, Inc. prays for judgment against plaintiff and for its costs.

McCOLLOCH, DEZENDORF, SPEARS & LUBERSKY
James C. Dezendorf
James H. Clarke

McCUTCHEN, DOYLE, BROWN & ENERSEN
William W. Schwarzer
John R. Reese
By /s/ JOHN R. REESE
Attorneys for Defendants [706]

[Certificate of service omitted in printing] [707]

United States District Court
for the District of Oregon

[Title omitted in printing]

Civil No. 68-374

ANSWER OF DEFENDANT THE GREYHOUND CORPORATION TO THIRD AMENDED COMPLAINT

Defendant The Greyhound Corporation answers plaintiff's third amended complaint as follows:

DEFENSES TO FIRST CAUSE OF ACTION

FIRST DEFENSE TO FIRST CAUSE OF ACTION

Plaintiff's first cause of action does not state a claim against this answering defendant on which relief can be granted.

SECOND DEFENSE TO FIRST CAUSE OF ACTION

1. Answering paragraph 1, defendant The Greyhound Corporation admits that this action is instituted under § 4 of the Clayton Act (15 USC § 15). Defendant denies the remainder of paragraph 1.

2. Defendant denies paragraph 2. [1140]

3. Defendant admits paragraph 3.

4. Defendant admits paragraph 4, except it avers that its principal place of business is in Phoenix, Arizona, and that on December 31, 1963, it discontinued the operation of scheduled common carrier passenger motor bus service and transferred its motor carrier operating rights and properties to defendant Greyhound Lines, Inc., which came into existence and commenced operations at that time.

5. Defendant admits paragraph 5, except it avers that defendant Greyhound Lines, Inc., has its principal place of business in Phoenix, Arizona and has engaged in the operation of scheduled common carrier passenger motor bus service since January 1, 1964.

6. Defendant admits paragraph 6, except it denies that it has violated the antitrust laws and further denies that the market to which plaintiff's allegations refer is the scheduled common carrier passenger motor bus service market within the Western United States.

7. Defendant avers that it is without knowledge or information sufficient to form a belief as to the truth of averments contained in paragraph 7, except that defendant admits that plaintiff has held itself out to provide scheduled service from and between various points within Oregon, Idaho and Utah.

8. Answering paragraph 8, defendant admits that defendant Greyhound Lines, Inc. is the largest company engaged in passenger motor carriage in the United States. Defendant denies the remainder of paragraph 8.

9. Defendant denies paragraph 9.

10. Defendant denies paragraph 10.

11. Defendant denies paragraph 11, except: Defendant [1141] admits that it acquired control of several formerly independent bus lines and merged them into its system and obtained the consent of the Interstate Commerce Commission for such acquisitions and mergers; defendant admits that defendant Greyhound Lines, Inc., has facilities for selling bus service; as to allegation (e), defendant admits that it dismissed a request to abandon service, that plaintiff applied for the rights being abandoned, and that it filed a protest against plaintiff's application; and defendant admits that defendant Greyhound Lines, Inc.,

discontinued existing joint-line through bus operations with plaintiff for a period of time but has reinstituted the same.

12. Defendant denies paragraph 12.

13. Defendant denies paragraph 13, except that defendant admits and avers that plaintiff had knowledge and information with respect to the activities, actions, practices and policies of defendant and of Greyhound agents, to the extent applicable concerning the quoting of plaintiff's services, inclusion of plaintiff's services on schedules and maps, routing of traffic and instructions to agents.

14. Defendant denies paragraph 14.

THIRD DEFENSE TO FIRST CAUSE OF ACTION

All or part of plaintiff's first cause of action is barred by § 4B of the Clayton Act, 15 USC § 15B.

FOURTH DEFENSE TO FIRST CAUSE OF ACTION

The acquisitions of control and mergers of bus lines, selling agents, outlets and depots referred to in plaintiff's third amended complaint were authorized and approved by the Interstate Commerce Commission under § 5(2) of the Interstate Commerce Act, 49 USC § 5(2), and this answering defendant is relieved from the operation of the antitrust laws and all state [1142] laws insofar as necessary to carry the same into effect and to hold, maintain and operate said properties and to exercise any control and franchises thereby acquired under § 5(11) of the Interstate Commerce Act, 49 USC § 5(11).

DEFENSES TO PLAINTIFF'S SECOND CAUSE OF ACTION

FIRST DEFENSE TO SECOND CAUSE OF ACTION

Plaintiff's second cause of action does not state a claim against this answering defendant on which relief can be granted.

SECOND DEFENSE TO SECOND CAUSE OF ACTION

1. Defendant The Greyhound Corporation admits paragraph 1.

2. Answering paragraph 2, defendant realleges the admissions, denials and averments in its *Second Defense to First Cause of Action* as to paragraphs 2, 3, 4, 5, 6, 7, 8, 11, 12, 13 and 14 of plaintiff's first cause of action.

3. Defendant denies paragraph 3.

THIRD DEFENSE
TO SECOND CAUSE OF ACTION

Part or all of plaintiff's second cause of action is barred by the applicable statute of limitations.

FOURTH DEFENSE
TO SECOND CAUSE OF ACTION

Defendant realleges its fourth defense to plaintiff's first cause of action.

DEFENSES TO PLAINTIFF'S
THIRD CAUSE OF ACTION

FIRST DEFENSE TO THIRD CAUSE OF ACTION

Plaintiff's third cause of action does not state a claim against this answering defendant on which relief can be granted.

SECOND DEFENSE TO THIRD CAUSE OF ACTION

1. Answering paragraph 1, defendant The Greyhound [1143] Corporation denies that this court has jurisdiction or that plaintiff's third cause of action presents a Federal question or that any cause of action exists for unfair competition under the laws of the United States.

2. Answering paragraph 2, defendant realleges the admissions, denials and averments in its *Second Defense to First Cause of Action* and in paragraph 2 and 3 of its *Second Defense to Second Canse of Action* insofar as the same respond to averments incorporated by reference in plaintiff's Third Cause of Action. Defendant denies that any conduct of defendant has caused plaintiff irreparable damage.

THIRD DEFENSE TO THIRD CAUSE OF ACTION

Part or all of plaintiff's second cause of action is barred by the applicable statute of limitations.

FOURTH DEFENSE TO THIRD CAUSE OF ACTION

Defendant realleges its fourth defense to plaintiff's first cause of action.

WHEREFORE, defendant The Greyhound Corporation prays for judgment against plaintiff and for its costs.

Dated: June 27, 1972.

McCOLLOCH, DEZENDORF, SPEARS & LUBERSKY
James C. Dezendorf
James H. Clarke

McCUTCHEN, DOYLE, BROWN & ENERSEN
William W. Schwarzer
John R. Reese
/s/ By JOHN R. REESE
Attorneys for Defendants [1144]

[Certificate and acknowledgement of service omitted in printing] [1145] & [1146]

ALFRED T. GOODWIN [Letterhead]

UNITED STATES COURT HOUSE
PORTLAND, OREGON 97205

November 22, 1972

Messrs. Bruce M. Hall, George Meier, III
Rives, Bonyhadi, Hall & Epstein
1400 Public Service Building
Portland, Oregon 97204

Messrs. Michael N. Khourie, Eugene C. Crew
Broad, Khourie & Schulz
425 California Street, Suite 2404
San Francisco, California 94104

Messrs. James C. Dezendorf, James H. Clarke
McColloch, Dezendorf, Spears & Lubersky
8th Floor Pacific Building
Portland, Oregon 97204

Messrs. William W. Schwarzer, John R. Reese,
Kenneth Drexler
McCutchen, Doyle, Brown & Enersen
601 California Street
San Francisco, California 94108

Gentlemen:

Re: MT. HOOD STAGES, INC. etc. v.
THE GREYHOUND CORPORATION et al.

D. Or. Civ. No. 68-374

I have been unable to resolve scheduling conflicts caused by a change in date of the Ninth Circuit Symposium from

April to January, and accordingly must reschedule your trial to begin March 26, 1973.

Both sides have preserved in the record a request for jury trial, but both have expressed doubt about persisting in the request. The Clerk will need to know not later than February 1, 1973, whether there will be a jury. It will be helpful if you can advise me by January 1.

I indicated on October 19, 1972, that I would advise counsel of a number of rulings previously reserved for various reasons. In the interest of obtaining a pretrial [1354] order in final form, I now want to advise counsel of my rulings on the reserved questions. Most are self-explanatory; for convenience, I will follow the order in which the questions are listed in Mr. Clarke's proposed issues of law (page 25 of his proposed pretrial order).

A. The opinions and orders of the ICC and the District Court in Mt. Hood Stages, Inc., Petition for Modification—Greyhound Mergers, No. MC-F-9136:
   1. Do not give rise to collateral estoppel with respect to any issue of fact or law in this action;
   2. Are not admissible in evidence for any purpose.

B. Representations and testimony in earlier proceedings may have probative value on one or more issues, and will be received to the extent that they are relevant and not excludable as hearsay.

C. Evidence of consent decrees, or opinions, complaints, orders, or judgments in other cases will not be received.

D. I can conceive of no injunctive relief in this court that could not have been had in proper administrative proceedings, and, accordingly, request the plaintiff to omit such relief from the pretrial order.

E. I have concluded that the plaintiff's claim for damages for unfair competition is probably redundant, but I will allow the issue to remain in the case for the time being. If the plaintiff can present a factual situation within the pleadings that give rise to common-law damages and does not amount to anticompetitive conduct in violation of the antitrust laws, I am willing to submit it, but I see nothing in the proposed pretrial order to date that presents a triable issue on that theory.

F. Clayton Act statute of limitations.

1. Fraudulent concealment. I do not believe that sufficient facts appear at this time [1355] to say that fraudulent concealment is not in dispute and that Mt. Hood had reason on a specific date in history to know of facts that constituted a claim under the antitrust laws. After plaintiff rests, such a date, if any, probably can be determined.
2. The 5(b) exception. I believe the Congressional intent behind 5(b) is better served by treating intervention by Antitrust Division lawyers as the functional equivalent of a direct action by them.

Accordingly, both parties should plan on the plaintiff's trying to prove, and the defendants' meeting, damages running back to the time Greyhound began to route passengers around Mt. Hood, if it did. If the case is tried to a jury, I will submit interrogatories based upon appropriate alternative dates, and if a jury is waived the segregation can be handled by findings so that, if the Circuit takes a different view, the matter can be remedied without a new trial on the damages issues.

G. If the pretrial order in its final form contains a viable pendente claim for common-law damages under Oregon law, I will treat it as controlled by the local law on limitations.

H. I have concluded that there can be no claim made on the theory of an intramural conspiracy. If separate corporations conspired, that is another matter. (A claim that officers of the holding company conspired with officers of the operating company does not appear to have support in the discovery to date.) As of now, I will order stricken any claims of Sherman Act violations by Greyhound Lines' officers conspiring among themselves. Claims of improper conduct between Greyhound and its independent agents, however, are presently a major part of the case.

I trust that the foregoing covers the pending questions upon which rulings are needed prior to the lodging of the [1356] pretrial order. If further matters require rulings prior to completion of the pretrial order, I will expect counsel to call them to my attention at an early date.

Yours very truly,

/s/ Alfred T. Goodwin
Alfred T. Goodwin
United States District Judge,
sitting as District Judge
by designation

ATG hm

Original to be filed with Clerk of the United States District Court for the District of Oregon [1357]

United States District Court
District of Oregon

[Title omitted in printing]

Civil No. 68-374

SPECIAL VERDICT

We, the jury, answer the interrogatories as follows:

1. Do you find from the evidence that defendants or either of them violated Section 1 of the Sherman Act?

YES	NO
✓	

2. Do you find from the evidence that defendants or either of them violated Section 2 of the Sherman Act?

YES	NO
✓	

If the answers to Nos. 1 and 2 are *both* "no", you need not answer any further questions.

3. If the answer to Nos. 1 or 2 is "yes", do you find that such violations were fraudulently concealed [2248] by defendants, from plaintiff:

(a) during the period January 1, 1953, to December 14, 1960?

YES	NO
✓	

(b) during the period December 15, 1960 to July 4, 1964?

YES	NO
✓	

4. If the answer to No. 3 (a) or (b) is "yes", please state the date prior to July 5, 1964, which, under the instructions I have given you, you find was the time plaintiff knew or should have known of this violation:

Dec. 14, 1960 (DATE)

5. If the answer to Nos. 1 or 2 is "yes", do you find that plaintiff was injured by such violations of the antitrust laws?

YES	NO
✓	

6. If you answer question 5 "yes", then fill in for each of the following periods the amount of damages if any sustained in that period:

July 5, 1964, to March 25, 1973	Amount	$2,650,491
December 15, 1960 to July 5, 1964	Amount	$ 626,482
January 1, 1953, to December 15, 1960	Amount	$1,105,057

Dated this 2nd day of May, 1973.

/s/ NORA O. PIRRIE
Foreman of the Jury [2249]

United States District Court
District of Oregon

[Title omitted in printing]

CIVIL NO. 68-374

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, FOR A NEW TRIAL AND TO STRIKE CERTAIN EVIDENCE

Defendants The Greyhound Corporation and Greyhound Lines, Inc., hereby move this Court for judgment notwithstanding the verdict or, alternatively, for a new trial, and to strike certain evidence.

Defendants move the Court for an order setting aside the verdict heretofore entered in this action and for judgment in favor of the defendants in accordance with defendants' previous motion for directed verdict on each of the following grounds: [2256]

1. The conduct complained of herein by plaintiff, is immune from the operation of the antitrust laws by reason of Section 5(11) of the Interstate Commerce Act (49 U.S.C. § 5(11)).

2. The jurisdiction of this Court over the conduct complained of, is preempted by the Interstate Commerce Commission's jurisdiction over this same conduct.

3. There is no evidence from which the jury could properly find a violation of Section 1 of the Sherman Act.

4. There is no evidence from which the jury could properly find a violation of Section 2 of the Sherman Act.

5. There is no evidence from which the jury could properly find that plaintiff was injured in its business or property by reason of a violation of Sections 1 or 2 of the Sherman Act.

6. There is no evidence from which the jury could properly find that defendants' violations, if any, had been fraudulently concealed from plaintiff at any time relevant herein.

7. That all claims arising prior to July 5, 1964 are barred by the provisions of Section 4B of the Clayton Act (15 U.S.C. § 15b).

In the alternative, defendants move this Court for an order setting aside the verdict herein and granting a new trial of this action for the reasons set forth above and for the further reason that prejudicial error was committed by the admission of certain evidence, by the giving of certain instructions and by the refusal to give certain other instructions.

Defendants further move to strike certain exhibits offered by plaintiff and received in evidence on the ground that they are prejudicial and are not supported by the evidence.

The above motions are based upon Rules 50(b) and 59 [2257] of the Federal Rules of Civil Procedure, the memorandum of points and authorities to be filed hereafter and on the files and records in this action.

Dated: May 8, 1973.

DEZENDORF, SPEARS, LUBERSKY & CAMPBELL
McCUTCHEN, DOYLE, BROWN & ENERSEN
By /s/ JOHN R. REESE
Attorneys for Defendants [2258]

[Certificate and acknowledgement of service omitted in printing] [2259] & [2260]

In the United States District Court
for the District of Oregon

Civ. No. 68-374

Mt. Hood Stages, Inc., doing
business as Pacific Trailways,
Plaintiff,

v.

The Greyhound Corporation and
Greyhound Lines, Inc.,
Defendants.

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Alfred T. Goodwin presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED that plaintiff, Mt. Hood Stages, Inc., doing business as Pacific Trailways, recover of the defendants, The Greyhound Corporation and Greyhound Lines, Inc., the sum of $13,146,090 with interest thereon at the rate of six per cent as provided by law, and for its costs, and for its reasonable attorneys' fees to be set after a hearing upon the conclusion of all posttrial motions in this court.

DATED at Portland, Oregon, this 11th day of May, 1973.

/s/ Alfred T. Goodwin
United States Circuit Judge sitting
as District Judge by Designation
[2261]

In the United States District Court
for the District of Oregon

Civ. No. 68-374

Mt. Hood Stages, Inc., doing
business as Pacific Trailways,
Plaintiff,

v.

The Greyhound Corporation
and Greyhound Lines, Inc.,
Defendants.

• • •

[Filed November 30, 1973] [2874]

GOODWIN, Judge:*

Greyhound has moved for a judgment notwithstanding the verdict and for a new trial in this treble-damage antitrust action which resulted in a verdict and judgment for Mt. Hood Stages. The principal issue is whether *Hughes Tool Co. v. Trans World Airlines,* 409 U.S. 363 (1973), compels a judgment n.o.v.

Greyhound asserts:

(1) The action is barred by Section 5(11) of the Interstate Commerce Act, 49 U.S.C. § 5(11);

(2) There was insufficient evidence (of conspiracy and of monopolization) to sustain the verdict;

(3) A new trial should be granted because of the numerous errors of law in the taking of evidence and in the instructions to the jury.

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*The Honorable Alfred T. Goodwin, United States Circuit Judge, sitting as District Judge by designation.

All of these contentions rehearse issues which were briefed and argued extensively at trial and in hearings before trial. Now, as then, the law and the facts of this case are such that the issues must be resolved against the defendants. If there was error here or there in an evidentiary ruling, none was so prejudicial as to warrant the abortion of a lengthy trial. *See* Fed. R. Civ. P. 61.

The evidence revealed long-standing, calculated, and damaging conduct which, but for Section 5(11) of the Interstate Commerce Act, plainly would have violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2.

Mt. Hood proved, *inter alia,* that Greyhound had: (1) directed independent and joint ticket agents to long-haul traffic around Mt. Hood; (2) interfered with the distribution of Mt. Hood's schedules; (3) scheduled connecting service so as to preclude reasonable connections [2875] with Mt. Hood; and (4) discontinued through bus service important to Mt. Hood's scheduled routes.

The I.C.C. and reviewing courts have found that Greyhound willfully breached earlier representations made to the Commission in acquisition proceedings and engaged in destructive competition.[1] The destructive practices established by the record before the Commission were enjoined by a three-judge panel of a district court,[2] and Greyhound was subsequently held in criminal contempt for violating that injunction.[3] I mention these collateral cases, not because I relied upon them in this case, but because they establish two points that do have some relevance to policy considerations that bear upon this case.

1. See, *e.g.*, Petition for Modification—Greyhound Mergers (Western Div.), 104 M.C.C. 449 (Div. 3, 1968); I.C.C. Affirmance of the Order of Division 3, No. MC-F-9136 (Dec. 11, 1968; April 14, 1969); *Greyhound Lines, Inc. v. United States,* 301 F. Supp. 356 (N.D. Ill. 1969) (denying motion for temporary restraining order).

2. *Greyhound Lines, Inc. v. United States,* 308 F. Supp. 1033 (N.D. Ill. 1970).

3. *United States v. Greyhound Corp.,* No. 71-CR-924 (N.D. Ill., June 27, 1973).

In the first place, the litigation before the Commission has proceeded for approximately a decade with no apparent impact upon Greyhound's conduct. If Congress intended the Interstate Commerce Act to provide a remedy for competitors injured by predatory behavior on the part of regulated carriers, then the legislation is woefully inefficient. Second, if proof outside the abundant proof in this record were needed, the collateral cases strip away any pretense that Greyhound's conduct toward its competitors was simply the result of good-faith aggressive management. The costs to Greyhound of the prolonged litigation before the Commission apparently have been more than offset by the profits Greyhound has derived by flouting the Commission's cease-and-desist orders. If there was ever a case in which a private action for damages is demonstrably necessary to carry out national antitrust policy, this is it.

Section 5(11) of the Interstate Commerce Act obviously is the key issue. That section provides, in relevant part: [2876]

> "• • • [A]ny carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction • • •." 49 U.S.C. § 5(11).

The effect of a similar statute on the antitrust liability of a supplier of airline equipment was recently decided by the Supreme Court in *Hughes Tool Co. v. Trans World Airlines, supra.* When an agency, with the authority to immunize transactions from the operation of the antitrust laws, necessarily considers the public interest and approves conduct explicitly or implicitly before the agency as part of a proposed transaction, such conduct is thereby made immune from antitrust liability.

Mt. Hood poses the "flip side" of the *Hughes Tool* question: where a regulating agency with the authority to immunize conduct from the operation of the antitrust laws has not approved the conduct complained of, and indeed has ordered it stopped, does the approval by the agency of related transactions and the existence of a pervasive regulatory scheme, including the availabality of some remedy, adequate or not, under that scheme preclude antitrust liability? I hold that it does not. *See Hughes Tool Co. v. Trans World Airlines,* 409 U.S. at 387:

> "We repeat, however, what we said in the *Pan American* case that the Federal Aviation Act does not completely displace the antitrust laws." [2877]

The Supreme Court has repeatedly made it clear that repeal of the antitrust laws is not to be lightly assumed. *See, e.g., Ricci v. Chicago Mercantile Exchange,* 409 U.S. 289 (1973); *United States v. Philadelphia Nat'l Bank,* 374 U.S. 321, 350 (1963); *Georgia v. Pennsylvania R.R.,* 324 U.S. 439, 456-57 (1945). *See also Price v. Trans World Airlines,* 481 F.2d 844 (9th Cir. 1973) (post-*Hughes Tool Co.* antitrust action stayed pending resort to Civil Aeronautics Board).

Mt. Hood is not here seeking the kind of relief that could be provided by the I.C.C.[4] That kind of relief has been sought, and for nearly ten years has proven to be illusory. Here Mt. Hood is seeking only the antitrust remedy of treble damages, relief that can be granted only in court and which is supplemental to those administrative remedies which could be ordered by the I.C.C.

The antitrust issues raised by Greyhound's conduct were not considered or passed upon by the Commission in the initial acquisition proceedings. Were this court to hold that merely because the I.C.C. has authority to approve acquisitions, routes and schedules and order some relief with respect to some of the conduct complained of Congress had thereby placed exclusive jurisdiction in the I.C.C. over all conduct related to the approved transactions, this would amount to an almost total exemption of a carrier's conduct from the antitrust laws. Rather, all that *Hughes Tool* teaches is that the substantive exemptions from the antitrust laws created by Congress or required by the structure of the regulatory scheme are not destroyed through by-passing or overriding the forum chiefly entrusted with the regulation of the industry in question. *See REA* [2878] *Express v. Alabama Great So. Ry.,* 412 U.S. 934 (1973) (affirming a three-judge court's *stay* of an antitrust suit pending I.C.C. reconsideration of a prior financing arrangement order on the issue of possible antitrust immunity).

A court's antitrust jurisdiction is ousted only when the specified agency, pursuant to its statutory authority, approves the challenged actions. If an agency thus grants an

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4. See 49 U.S.C. §§ 9, 16. Though the I.C.C. has jurisdiction to award damages, this power is limited to cases in which damages result from activity which can be classified as a violation of the Interstate Commerce Act. *National Trucking & Storage Co. v. Pennsylvania R.R.,* 228 F.2d 23, 30 (D.C. Cir. 1955).

exemption from the antitrust laws, that determination is binding unless a court should set it aside for one of the reasons enumerated in Section 10(e) of the Administrative Procedure Act.[5] By the same token, however, conduct which not only has not been expressly approved but which has been expressly disapproved by the agency ought then to be subject to antitrust remedies supplemental to those which could have been granted by the agency.

A contrary decision would not only be an unsound reading of legislative intent, but would also be impractical. It would foreclose from the courts the option of utilizing primary jurisdiction, a technique which does not preclude a later judicial antitrust proceeding should the agency first determine that the complained-of acts were not immunized. *Cf. Ricci v. Chicago Mercantile Exchange,* 409 U.S. at 305-06; *Federal Maritime Board v. Isbrandtsen Co.,* 356 U.S. 481, 498-99 (1958). Greyhound's reading of Section 5(11) would place upon the I.C.C. the impossible burden of anticipating and ruling upon all the possible antitrust implications of all conduct conceivably related to any transaction subject to I.C.C. approval at the risk of subsequently being held to have conferred a blanket antitrust immunity.

In my other rulings, and in rejecting various proposed instructions, I tried to state my reasons as the case [2879] progressed. Accordingly, I will not extend this Memorandum by repeating those reasons here.

IT IS ORDERED:

(1) The motion for judgment notwithstanding the verdict is denied;

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5. *E.g.,* 5 U.S.C. § 706(2):
"(A) arbitrary, capricious, an abuse of discretion • • •;
"(B) contrary to constitutional right • • •;
"(C) in excess of statutory jurisdiction • • •;
"(D) without observance of procedure required by law;
"(E) unsupported by substantial evidence • • •;
" • • • • • • ."

(2) The motion for a new trial is denied;

(3) The court will hear counsel on the matter of attorney's fees at 10:00 a.m., December 14, 1973.

DATED this 29th day of November, 1973.

/s/ ALFRED T. GOODWIN
Alfred T. Goodwin
United States Circuit Judge,
sitting as District Judge
by designation. [2880] & [2881]

In the United States District Court
for the District of Oregon

[Title omitted in printing]

Civil No. 68-374

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S PETITION FOR ALLOWANCE OF ATTORNEYS' FEES [2882]

• • •

INTRODUCTION

Plaintiff on May 17, 1973 filed its Petition for Allowance of Attorneys' Fees in the amount of $1,971,900, and in accordance with the Court's direction, for such additional attorneys' fees as the Court would award following post-trial motions. This request represents approximately 15% of the face amount of the judgment of $13,146,090, and approximately 45% of the jury verdict of $4,382,030. Plaintiff has now supported its Petition with the filing of (1) affidavits narrating time spent by plaintiff's counsel in preparing and presenting the case; (2) time sheets and time summaries; (3) biographical data regarding plaintiff's counsel; and (4) the files and records in the case.

APPLICABLE LAW

Section 4 of the Clayton Act provides in pertinent part:

> "Any person injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. § 15.

While the basis of attorney's fee awards for any case must ultimately rest within the sound discretion of the trial court,[1] these criteria have been applied with consistency within this Circuit:[2]

> "(1) whether plaintiff's counsel had the benefit of a prior judgment or decree in a case brought by the Government; (2) the standing of the counsel at bar; (3) time and labor spent; (4) magnitude and complexity of the litigation; (5) responsibility undertaken; (6) the amount recovered; (7) the knowledge the court has of the conferences, arguments that were presented and of work shown by the record to have been done by attorneys for the plaintiff prior to trial; (8) what it would be reasonable for counsel to charge a victorious plaintiff; and (9) what contribution shall be made by the defendant toward the fees of plaintiff's counsel." [2884]

STATISTICAL FRAME OF REFERENCE

These proceedings were commenced by the filing of Plaintiff's Complaint on July 5, 1968. Through November 30, 1973 plaintiff's counsel has expended in the prosecution of this action in excess of 10,190 hours (See Exhibit A). The docket sheets (Exhibit C) reflect at least twenty court appearances before this Court and The Honorable Gus J. Solomon. During discovery at least 41 depositions were taken in various of the Western states, some of considerable length. The deposition of William A. Niskanen took ten

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1. This Circuit has recently noted the "special competence" of the trial judge in the award of attorneys' fees at the trial court level. *Perkins v. Standard Oil of California,* CA-9, 1973 Trade Cases, 93,765, 93,767.

2. *Twentieth Century Fox Film Corp. v. Goldwyn,* [1964 Trade Cases ¶ 71,010], 328 F.2d 190, 221 (9th Cir. 1964), cert. denied, 379 U.S. 880; cited in *Clyde A. Perkins v. Standard Oil Company of California, supra.*

days alone, and is evidenced by nine volumes of deposition transcript. The deposition of Harry Drew covered seven volumes. Over 23,000 documents were examined by plaintiff's counsel in defendants' offices in San Francisco, Oakland, Seattle, Chicago, Evanston, Eugene and Medford from which some 500 were winnowed out for presentation in a jury trial. Because of the incompleteness of defendants' records (See Defendants' Objection to Interrogatory No. 2, Answers to Plaintiff's Second Set of Interrogatories which are attached hereto as Exhibit D) plaintiff was obliged to undertake, with outside expert assistance, difficult and complex traffic studies. These included monitoring, pursuant to Court Order, of defendant's driver's envelopes and ticket stubs through key gateways for a period of 12 months. The damage study submitted to the jury (Exhibit 476), itself the product of detailed sub-schedules, contained 62 pages. Trial was, at defendants' insistence,[1] by jury, and took 28 trial days, 6807 pages of transcript. The briefs of the parties in Defendants' Motion for Judgment Notwithstanding the Verdict or, in the alternative, for New Trial are the most recent indication of the magnitude of this [2885] case. Defendants' opening brief encompassed 139 pages; plaintiff's answering brief 288 pages, plus two detailed exhibits; and defendants' reply brief 112 pages.

ARGUMENT

We would now apply the foregoing recognized criteria to these proceedings:

(1) *Whether plaintiff's counsel had the benefit of a prior judgment or decree in a case brought by the Government.*

1. Defendants' letter to the Court filed December 19, 1972; plaintiff's Waiver of Jury trial filed December 11, 1972.

Although many decisions have been rendered by the I.C.C. and the U. S. District Court in Chicago against these defendants, nevertheless, and as a direct result of their completely successful opposition to plaintiff's continuing efforts to obtain collateral estoppel or even an effect as limited admissions of fact as to matters directly determined in those cases, defendants must be the first to admit that plaintiff's counsel obtained no benefits therefrom.

(2) *The standing of counsel at bar.*

The standing and experience of plaintiff's counsel has, at least as to the appellate proceedings, been subject in this Circuit to careful scrutiny. *Perkins v. Standard Oil Company of California,* 474 F.2d 549, (1973). For this reason, there is appended hereto as Exhibit E, a summation of the background and experience of plaintiff's principal attorneys in this highly specialized area of practice. As to their industry and perseverance, plaintiff's attorneys are hopeful that the docket sheet in this case, attached hereto as Exhibit C, may serve as a reminder of the unrelenting skirmishes and battles on the way to the ultimate jury verdict.

As to opposing counsel, although modesty in this instance may forbid, the firms of McCutchen, Doyle, Brown & Enersen of San Francisco, California and Dezendorf, Spears, Lubersky & Campbell [2886] of Portland, are preeminent amongst antitrust defense counsel in their respective areas of service. Each firm is large, resourceful, determined and experienced, as this Court has had occasion to observe on numerous occasions.

(3) *Time and labor spent.*

The time fairly spent on this case is as set forth in Exhibit B. We would only note herein that both parties

have undergone the same difficulty in having the place of trial in Portland, separated by considerable distance from the principal location of much of the evidence and of lead counsel in San Francisco. Plaintiff's counsel have, as indicated by the affidavits attached hereto, following the pledge of Herbert M. Schwab in the letter of engagement of July 1, 1968[1] taken the greatest pains to husband their limited time and resources against far larger opponents in order to most effectively prepare and present their claims before a jury.

(4) *Magnitude and complexity of the litigation.*

This Court has had occasion to remark upon the complexity and magnitude of the issues at bar.[2] These issues, while not possessing the novelty claimed for them by defendants in dramatizing their defense, nonetheless, particularly as to the Section 2 monopolization charges, have required the most careful consideration.

(5) *Responsibility undertaken.*

Plaintiff's counsel undertook a grave responsibility in this case. Mt. Hood Stages has been under a virtual state of seige by these defendants, and the evidence rather dramatically supports the thesis that the survival of this company has been very much [2887] intertwined with the continuing viability of the Central Oregon region as an economic entity. Mt. Hood Stages is the principal public transportation bridge for this region into the outside world. This company represented the last, and perhaps the only,

1. "We will of course work together closely, and avoid unnecessary duplication of effort."

2. Exhibit K, at Tr. 6796.

contestant in the Pacific Northwest with the will to fight and to win against Greyhound's monopoly power. The realization of the importance of Mt. Hood's stubborn stand provided impetus to the vigorous prosecution by the Interstate Commerce Commission and the Department of Justice of enforcement proceedings against Greyhound following the Chicago's Court's determination in the Modification case.

The foregoing considerations bring to mind the observation of the Ninth Circuit in *Flintkote Company v. Lysfjord,* 246 F.2d 268 (9th Cir. 1956), *cert.den.* 256 U.S. 835 (1959) in considering the contribution of the private litigant to the antitrust enforcement scheme:

> "The private antitrust action is an important and effective method of combatting unlawful and destructive business practices. The private suitor complements the government in enforcing the antitrust laws."

6. *The amount recovered.*

The trebled award of $13,146,090 was based upon a jury verdict of $4,382,030. As has been previously pointed out the attorneys' fees requested of $1,971,900 represents approximately 15% of the face amount of the judgment and approximately 45% of the jury verdict. As likewise earlier noted, these percentages may be compared to the attorneys' fee award of $289,000 in *Clyde A. Perkins v. Standard Oil Company of California,* Civil No. 369-59 on May 14, 1964 which award amounted to 86% of the single damages jury verdict and more than 28-12% of the treble damage judgment. Such award was confirmed in *Perkins v. Standard Oil Company of California,* (1969 Trade Cases ¶ 72,822), 395 U.S. 642 (1969). The present request, making allowance for the larger award in this case, is therefore well within the experience of this District. [2888]

(7) *The knowledge the court has of the conferences, arguments that were presented and of work shown by the record to have been done by attorneys for the plaintiff prior to trial.*

This criterion is one upon which plaintiff believes it can fairly rely. The work required to attain success in this case was certainly of epic proportions, at least from plaintiff's point of view, and plaintiff's burden was not eased by defendants' insistence upon a jury trial. The record is "in evidence", and, we submit, speaks for itself. If defendants sincerely hold that this was "a case that should never have been tried", then they particularly will not gainsay plaintiff its claim to a singular accomplishment.

(8) *What it would be reasonable for counsel to charge a victorious plaintiff.*

This Court is well aware of the contingent fee schedules in the States of Oregon and California, each of which, absent some contribution by plaintiff to its attorneys' overhead and expenses, would command fee percentages of two or three times that requested here. See Exhibit G. Plaintiff has, in its view, liberally discounted the effect of a partial retainer upon the normal contingent fee percentage received in civil cases. Plaintiff is prepared, if necessary, to present expert testimony as to this criterion.

(9) *What contribution shall be made by the defendant toward the fees of plaintiff's counsel.*

The Court now has before it as Exhibit F, plaintiff's fee arrangement with its counsel. The amount requested there is less that one-half the payment plaintiff will make to its counsel in the event it is ultimately successful. As Judge Wyzanski stated in *Cape Cod Food Products v. National Cranberry Association,* 119 F.Supp 242, 244 (D.Mass. 1954). [2889]

> "[A] losing defendant must pay what it would be reasonable for counsel to charge a victorious plaintiff. The rate is the free market price, the figure which a willing, successful client would pay a willing, successful lawyer. Sometimes the figure may seem high but so far as price is determined by unique excellence or by social usefulness, the advocate is especially worthy of larger recompense."

CONCLUSION

It is universally recognized that the award of a reasonable attorneys' fee at the conclusion of a successful prosecution of a private antitrust treble damage action must rest ultimately in the discretion of the trial court,[1] with due consideration given to the various factors enunciated for guidance within this Circuit in *20th Century Fox v. Goldwyn,* supra, as noted with approval this year in *Perkins v. Standard Oil Company of California,* supra.[2890] This Court has stated in its opinion of November 30, 1973: "If there was ever a case in which a private action for damages

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1. While the applicable standards have been consistently observed, the award itself must necessarily vary with the degree of prominence of one or more criteria. In *Alpine Pharmacy, Inc., et al v. Chas. Pfizer & Co., Inc., et al,* 481 F.2d 1045 (1973), the Second Circuit commented:

> "In the end, no mathematical formula, or precise weighing of specific factors is necessary, nor often desirable. In fact, there is no requirement that each of the listed criteria be taken into account, only that the final award be reasonable under the circumstances of the case.
>
> "As one commentator has noted, 'there are nearly as many notions of what is reasonable as there are judges.' Clark, The Treble Damage Bonanza: New Doctrines of Damages in Private Antitrust Suits, 52 Mich. L.Rev. 363, 412 (1954)."

To the same effect is "Attorneys' Fees in Individual and Class Action Antitrust Litigation", 60 California Law Review 1656 (1972), wherein the writer has collected and analyzed numerous attorneys' fees awards, and has observed: "Indeed it seems there are almost as many notions of what is reasonable as there are judges."

is demonstrably necessary to carry out national antitrust policy, this is it." Plaintiff submits that upon considerations of public policy and of the effort expended herein its request for its attorneys' fees for the trial of this cause is reasonable.

Respectfully submitted,

HALL & NOVACK
BROAD, KHOURIE & SCHULZ
/s/ By BRUCE M. HALL
BRUCE M. HALL [2891]

[Certificate of service omitted in printing] [2892]

TESTIMONY OF MAXWELL BLECHER GIVEN DECEMBER 20, 1973 (Tr. 6818-6819)

"Q. . . . I ask you as to the first criteria: Whether plaintiff's counsel had the benefit of a prior judgment or decree in a case brought by the Government?

A. The question is whether I have considered that?

Q. Yes, and what weight did you give to it, if any?

A. Yes, I have considered it. . . . [Tr. 6818]

• • •

My review of the record in this case indicates that not only did the plaintiff not have the benefit of any prior Government adjudication, but, in fact, this record formed the basis of a concomitent proceeding before the Interstate Commerce Commission in which the anti-trust division convened, and in which it secured a contempt citation for the conduct involved.

So that I think actually, here, you had no benefit from what the Government did, but you were simultaneously preparing the Government case in the private case.[Tr. 6819]

PORTION OF MT. HOOD CLOSING ARGUMENT AT HEARING RE ATTORNEYS' FEES December 20, 1973 (Tr. 6893-6894)

". . . this private action did a tremendous job of enforcement and, in fact, has caused the Government to act rather than the reverse and the Government has acted and a crimina [Tr. 6893] conviction has been obtained." [Tr. 6894]

In the United States District Court
for the District of Oregon

Civ. No. 68-374

Mt. Hood Stages, Inc., doing
business as Pacific Trailways,

Plaintiff,

v.

The Greyhound Corporation
and Greyhound Lines, Inc.,

Defendants.

MEMORANDUM AND ORDER ON ATTORNEY FEES [3271]

After reviewing the file, the exhibits offered in support of the claim for attorney fees, and all the evidence offered by both parties on the question of a reasonable attorney fee, I have concluded that compensation at an hourly rate would be inadequate in a case of this kind.

I have considered all of the factors Judge Hamley enumerated in *Twentieth Century Fox Film Corp. v. Goldwyn,* 328 F.2d 190 (9th Cir.), *cert. denied,* 379 U.S. 880 (1964), and have given weight to all of them. I believe that this case is, in many ways, unusual, and that its complexity and difficulty set it somewhat apart from the common run of antitrust cases, if such a category in fact exists.

I will not attempt to go through the figures, or the evaluation process, by assigning cash value to the various elements. Rather, I have decided to give substantial effect to the result achieved, and to the other factors in the perspective of the four years I have known the case in all its details. I have concluded that a reasonable fee to be assessed

against the defendant is the sum of $1,250,000. The attorney's fee is to bear interest at the statutory rate for judgments until paid.

The Clerk will draw and submit for my signature a final judgment, accordingly in the total sum of $14,396,090.00, plus costs to be taxed.

/s/ ALFRED T. GOODWIN
United States Circuit Judge,
sitting as District Judge
by designation. [3272]

In the United States District Court
for the District of Oregon

Civil No. 68-374

Mt. Hood Stages, Inc., doing
business as Pacific Trailways,

Plaintiff,

vs.

The Greyhound Corporation
and Greyhound Lines, Inc.,

Defendants.

AMENDED JUDGMENT

Based upon the court's order entered contemporaneously herewith,

IT IS CONSIDERED AND ORDERED that the plaintiff MT. HOOD STAGES, INC. have and recover judgment against the defendants THE GREYHOUND CORPORATION and GREYHOUND LINES, INC., and each of them, in the amount of $14,396,090.00, together with interest at the rate of six percent on the sum of $13,146,090.00, from May 11, 1973 to this date, plus costs to be taxed.

IT IS FURTHER ORDERED that this judgment supersede and replace the judgment herein entered on May 11, 1973, and that the sum of $14,396,090.00 will bear interest at the rate of six per cent as provided by law from the date hereof until paid.

DATED this 21st day of December, 1973.

/s/ Alfred T. Goodwin
United States Circuit Judge,
sitting as District Judge
by Designation [3273]

United States District Court
for the District of Oregon

[Title omitted in printing]

Civil No. 68-374

NOTICE OF APPEAL

Notice is hereby given that defendants The Greyhound Corporation and Greyhound Lines, Inc., appeal to the United States Court of Appeals for the Ninth Circuit from the judgment in favor of plaintiff entered herein on May 14, 1973, and from the amended judgment entered herein on December 21, 1973, and from all pretrial, interlocutory and post-trial orders herein.

Dated: December 26, 1973.

Dezendorf, Spears, Lubersky &
Campbell
James C. Dezendorf
James H. Clarke
McCutchen, Doyle, Brown &
Enersen
William W. Schwarzer
John R. Reese
By /s/ James H. Clarke
Of Attorneys for Defendants [3275]

United States Court of Appeals,
Ninth Circuit.

Mt. Hood Stages, Inc., dba Pacific Trailways, Plaintiff-Appellee,

v.

The Greyhound Corporation and Greyhound Lines, Inc.,

Defendants-Appellants.

No. 74-1282.
June 9, 1977.

Appeal from the United States District Court for the District of Oregon.

Before BROWNING and WRIGHT, Circuit Judges, and LINDBERG,* District Judge.

BROWNING, Circuit Judge:

Greyhound Corporation and Greyhound Lines, Inc., appeal from a judgment entered on a jury verdict awarding damages to Mt. Hood Stages, Inc., for injuries resulting from violations of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2.[1] We affirm.

I.

Immunity

Greyhound is the largest common carrier by bus of passengers and package express in the United States, moving more than 80 percent of this traffic in the western states

*Honorable William J. Lindberg, Senior United States District Judge, Western District of Washington, sitting by designation.

1. The judgment was for $13,146,090 (after trebling) and attorneys' fees of $1,250,000, plus costs.

and operating over routes throughout the country. Mt. Hood is one of Greyhound's small competitors, operating over routes in Oregon, Idaho, and Utah. The essence of Mt. Hood's antitrust claim is that Greyhound acquired bus companies whose routes circled those of Mt. Hood and thereafter deprived Mt. Hood of connecting or "bridge" traffic with the purpose and effect of eliminating Mt. Hood as a substantial competitor.

Greyhound does not deny the sufficiency of the evidence to establish a violation of sections 1 and 2 of the Sherman Act, assuming that statute applies. Its principal contention is that Mt. Hood bases its claim upon acquisitions approved by the Interstate Commerce Commission and implementation by Greyhound of control over the acquired companies, and that such activities are immune from antitrust attack by virtue of section 5(11) of the Interstate Commerce Act, 49 U.S.C. § 5(11), applied in light of the Supreme Court's analysis in *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973).

Section 5(2) of the Interstate Commerce Act, 49 U.S.C. § 5(2), provides that one carrier may acquire another with Commission approval; the Commission is required to grant such approval, subject to any terms and conditions it deems reasonable, if the acquisition "will be consistent with the public interest," *id.* Section 5(11) provides that carriers participating in transactions approved by the Commission are "relieved from the operation of the antitrust laws . . . insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction."

From 1947 to 1956 Greyhound acquired eight bus companies operating in the area relevant here. Each acquisition was approved by the Commission pursuant to section 5(2). Mt. Hood opposed four of the acquisitions. It argued that if the acquisitions were approved, Mt. Hood would be encircled and Greyhound could route traffic around it, depriving the public of the most convenient service and Mt. Hood of revenues necessary to its survival. Mt. Hood's argument to the Commission thus foreshadowed its present antitrust claim.

Greyhound responded by representing to the Commission that the acquisitions "would not adversely affect connecting carriers; that arrangements with such carriers, including interchange of traffic and open gateways, would be maintained; that it was not the policy of Greyhound to route passengers over circuitous routes; that its agents were instructed to quote the direct route as well as the Greyhound route and give passengers their choice; and that Greyhound had always carried [Mt. Hood's] schedules in its folders and cooperated in every way to acquaint the public with its service and thus promote additional traffic and business for their lines."[2] Greyhound also represented to the Commission that Greyhound would continue a joint through-bus arrangement with Mt. Hood.[3] As the Commission later

2. The quotation is from the Commission's opinion in the section 5(9) proceedings, described later. *Mt. Hood Stages, Inc.*, 104 M.C.C. 449, 452 (1968).

3. This agreement, initiated in 1949, provided for a through-bus from San Francisco, California, to Spokane, Washington, using Mt. Hood's bridge route between Klamath Falls and Biggs, Oregon. Revenue and expenses were shared according to the miles traveled over each company's route. The arrangement shortened the San Francisco-Spokane trip by 110 miles and several hours as compared with the all-Greyhound route via Portland. It provided better service to travelers and was profitable for both companies.

found, Greyhound intended the Commission to rely upon these representations in determining whether the proposed acquisitions were in the public interest, and the Commission did in fact rely upon them in approving the acquisitions.

In 1964 Mt. Hood filed a petition with the Commission pursuant to section 5(9) of the Act, 49 U.S.C. § 5(9),[4] asking it to reopen the acquisition proceedings and enter a supplemental order requiring Greyhound to live up to its representations. The allegations in Mt. Hood's petition to the Commission were essentially the same as those Mt. Hood later made in this antitrust suit—namely, that Greyhound had cancelled the through-bus connection, had scheduled connecting service so as to preclude reasonable connections with Mt. Hood, had directed Greyhound's agents and independent joint ticket agents to send traffic by longer routes around those of Mt. Hood, and has interfered in various ways with the distribution of Mt. Hood's schedules and the quotation of Mt. Hood's rates and services, all with the intent of injuring Mt. Hood. The United States intervened in support of Mt. Hood.

After an extensive evidentiary hearing, a hearing examiner resolved all issues against Greyhound and recommended entry of the order sought by Mt. Hood. In April, 1968, the Commission issued an opinion sustaining the examiner's findings that Greyhound had made the representations alleged, that Greyhound had intended the Commission to rely on them, that the Commission had relied on them in approving the acquisitions, that Greyhound had

4. Section 5(9) reads:

Supplemental orders by Commissions.—The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2), or (7) of this section, as it may deem necessary or appropriate.

not fulfilled the representations, and that Greyhound's actions "were inspired by a desire to stiffle competition" and "injure or destroy" Mt. Hood. *Mt. Hood Stages, Inc.*, 104 M.C.C. 449, 459-63 (1968). The Commission concluded that Greyhound's failure to abide by its commitment "constitutes destructive competition in contravention of the national transportation policy, is not consistent with the public interest, and provides good cause" for a supplemental order under section 5(9) of the Act. The Commission deferred entry of a supplemental order to allow voluntary negotiations between the parties. *Id.* at 462-63.

Two months later, in July, 1968, Mt. Hood filed this suit alleging violations of the antitrust laws and common law and statutory unfair competition. With respect to the antitrust violations the complaint alleged that, beginning in 1947 and continuing to the date of the complaint, Greyhound had restrained and monopolized commerce in the carriage of passengers and their luggage between points in Oregon, Idaho, and Utah by means essentially the same as those that were the subject of the Commission's proceeding; that is, the acquisition of independent bus lines with Commission consent obtained by the misrepresentations outlined by the Commission and thereafter engaging in the destructive competitive tactics found by the Commission. Greyhound sought, unsuccessfully, to eliminate these issues from the litigation on the ground that they fell within the exclusive jurisdiction of the Commission.

In the Commission proceedings, meanwhile, the efforts of the parties to agree upon an order failed. The Commission entered its own order requiring Greyhound to restore the practices and traffic patterns existing when the acquisitions at issue were authorized, and, specifically, to restore the joint through-bus service, to revise Greyhound's schedules to permit reasonable connections with Mt. Hood, to see that through routes and fares were quoted and quoted accurately, and to eliminate other destructive practices. *Greyhound Lines, Inc. v. United States*, 308 F.Supp. 1033, 1037 (N.D. Ill. 1970). A three-judge district court affirmed the Commission and issued its own order in similar terms. *Id.* at 1040-41. Following entry of the district court order enforcing the Commission decision, Mt. Hood amended the complaint in this antitrust proceeding to eliminate the prayer for injunctive relief.

In June, 1971, the United States and the Commission filed petitions with the district court in the enforcement proceeding, asking that Greyhound be held in contempt for failing to comply with the court's order enforcing the Commission's decision. The court found Greyhound had willfully failed to comply with portions of the order and held Greyhound in criminal and civil contempt. *United States v. Greyhound Corp.*, 363 F.Supp. 525 (N.D.Ill. 1973). The court imposed fines totaling $600,000, *United States v. Greyhound Corp.*, 370 F.Supp. 881, 883-85 (N.D.Ill. 1974), ordered Greyhound to file semiannual reports of compliance efforts for five years, and granted members of the Department of Justice staff "visitorial and document examination rights so that they may further monitor Greyhound's compliance efforts," *id.* at 886. Because Greyhound appeared to be attempting to comply fully, no further injunctive relief was ordered.

While the proceeding to enforce the Commission's order was in progress, this antitrust case had come to trial and concluded with the verdict in Mt. Hood's favor. The opinion of the court in the enforcement proceeding noted that "many of Greyhound's actions that were found to be in violation of the order, were also found to be in violation of

the antitrust laws" in this private suit. *Id.* at 884 n. 2. The enforcement court denied Mt. Hood's prayer for damages for expenses related to the contempt action and for injury to its business as a result of the contempt, on the ground that the damages awarded in this antitrust proceeding "will adequately compensate [Mt. Hood] for any damages it may have also suffered as a result of Greyhound's contempt. This is particularly true since many of the same acts of Greyhound that were found to be contemptuous were also involved in the private antitrust case." *Id.* at 888. The court of appeals affirmed the criminal contempt convictions, stating, "the record of this case shows a flagrant disregard of a court order" that was intended "to insure that Greyhound would comply with representations it made at the acquisition hearings and cease its predatory practices toward Mt. Hood." *United States v. Greyhound Corp.*, 508 F.2d 529, 540-41 (7th Cir. 1974).

From this recital it is evident that the conduct underlying the regulatory proceedings and that underlying the antitrust suit are essentially the same. The Commission's authority to regulate this conduct is not challenged.

Whether conduct Congress has made subject to administrative regulation is exempt from the antitrust laws depends upon Congress' intent. No direct evidence of a congressional intent relevant here has been cited.[5] The only applicable statutory language dealing with the question of antitrust immunity is that found in section 5(11), quoted above. The conduct charged in this action is not within the

5. The subject of antitrust immunity was touched upon briefly during the House debates. 58 Cong.Rec. 8593-94 (1919). The scope of the immunity was not discussed. Representative Sanders assured other House members that the antitrust laws were not being "wiped out"—that a merger will only be allowed if it would benefit the public. *Id.*

express exemption afforded by sections 5(11), particularly because provisions of this kind are strictly construed.[6] Since the Commission approved the acquisition in reliance upon Greyhound's commitment that the conduct underlying the anti-trust complaint would not occur if the acquisitions were approved, it can hardly be argued that antitrust immunity for such conduct is "necessary" to enable Greyhound "to carry into effect the transaction so approved . . . and to hold, maintain, and operate any properties and exercise any control . . . acquired through such transaction."

The inclusion of this express exemption in the statute implies a congressional intention that conduct not within the exemption remains subject to the antitrust laws.[7] But this conclusion does not always follow; despite a grant of express immunity that does not cover the conduct charged, antitrust immunity may still be implied.[8]

6. *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 733, 93 S.Ct. 1773, 36 L.Ed.2d 620 (1973); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 316, 76 S.Ct. 937, 100 L.Ed. 1209 (1956).

7. *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 216-17, 86 S.Ct. 781, 15 L.Ed.2d 709 (1966); *United States v. Borden Co.*, 308 U.S. 188, 201, 60 S.Ct. 182, 84 L.Ed. 181 (1939).

8. *See International Tel. & Tel. Corp. v. General Tel. & Elec. Corp.*, 518 F.2d 913, 918-19 & n. 24 (9th Cir. 1975). *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973), the decision relied upon most heavily by Greyhound, involved an express exclusion, and it is not entirely clear that the conduct that case held to be immunized from the antitrust laws was within the express exclusion, narrowly construed. The Court suggested as much when it noted, "a statutory scheme that does not create a total exception from antitrust laws may, nonetheless, in particular and discrete instances *by implication* grant immunity from an antitrust claim." *Id.* at 385 n. 14, 93 S.Ct. at 660 (emphasis added). The Supreme Court has twice cited *Hughes Tool* as a case in which immunity was implied. *See Gordon v. New York Stock Exch., Inc.*, 422 U.S. 659, 682, 95 S.Ct. 2598, 45 L.Ed. 2d 463 (1975); *United States v. National Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694, 734-35, 95 S.Ct. 2427, 45 L.Ed.2d 486 (1975).

Because of the "fundamental national policies embodied in the antitrust laws," *Otter Tail Power Co. v. United States,* 410 U.S. 366, 374, 93 S.Ct. 1022, 1028, 35 L.Ed.2d 359 (1973), however, repeal of those laws is not lightly implied from congressional adoption of a regulatory scheme.[9] Conduct is not immunized merely because it falls within the jurisdiction of the regulatory agency,[10] as it did in this case. Immunity is not implied merely because the applicable regulatory standard requires the agency to give weight to antitrust policy,[11] as it did in this instance.[12]

The applicable interpretative standard was restated by the Supreme Court in *Cantor v. Detroit Edison Co.,* 428 U.S. 579, 597, 96 S.Ct. 3110, 3120, 49 L.Ed.2d 1141 (1976): "The Court has consistently refused to find that regulation gave rise to an implied exemption without first determining that exemption was necessary in order to make the regulatory act work, 'and even then only to the minimum extent necessary.' "[13] As the Court had written in the preceding

9. *United States v. National Ass'n of Sec. Dealers, Inc.,* 422 U.S. 694, 719-20, 95 S.Ct. 2427, 45 L.Ed.2d 486 (1975); *United States v. Philadelphia Nat'l Bank,* 374 U.S. 321, 350-51, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963).

10. *Cantor v. Detroit Edison Co.,* 428 U.S. 579, 596-97 n. 36, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976); *Gordon v. New York Stock Exch., Inc.,* 422 U.S. 659, 692, 95 S.Ct. 2598, 45 L.Ed.2d 463 (1975) (Stewart, J., concurring); *Otter Tail Power Co. v. United States,* 410 U.S. 366, 372, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973).

11. *Gulf States Util. Co. v. Federal Power Comm'n,* 411 U.S. 747, 758-60, 93 S.Ct. 1870, 36 L.Ed.2d 635 (1973); *Otter Tail Power Co. v. United States,* 410 U.S. 366, 373, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973).

12. *Port of Portland v. United States,* 408 U.S. 811, 841, 92 S.Ct. 2513, 33 L.Ed.2d 723 (1972); *Northern Lines Merger Cases,* 396 U.S. 491, 511-16, 90 S.Ct. 708, 24 L.Ed.2d 700 (1970); *McLean Trucking Co. v. United States,* 321 U.S. 67, 83-87, 64 S.Ct. 370, 88 L.Ed. 544 (1944).

13. *Quoting Silver v. New York Stock Exch.,* 373 U.S. 341, 357, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963).

term, "Certain axioms of construction are now clearly established. Repeal of the antitrust laws by implication is not favored and not casually to be allowed. Only where there is a 'plain repugnancy between the antitrust and regulatory provisions' will repeal be implied." *Gordon v. New York Stock Exchange, Inc.,* 422 U.S. 659, 682, 95 S.Ct. 2598, 2611, 45 L.Ed.2d 463 (1975).[14]

Applying these standards, we find no reason to imply immunity here. No "plain repugnancy" exists between the Interstate Commerce Act and the Sherman Act as applied to Greyhound's conduct, and it is not necessary to exempt Greyhound's conduct from antitrust restraints "to make the [Interstate Commerce Act] work." This is evident from the course taken in the administrative and judicial proceedings under both statutes. Clearly there has been no conflict between the regulatory and antitrust regimes. On the contrary, they have accommodated and supplemented each other. The policies of both have been advanced. There has been initial resort to the Commission for an application of its expertise to the factual issues relevant to whether application of the antitrust laws would be incompatible with regulatory objectives, *see Ricci v. Chicago Mercantile Exchange,* 409 U.S. 289, S.Ct. 573, 34 L.Ed.2d 525 (1973), and the Commission has unqualifiedly indicated that is has not approved and continues to disapprove Greyhound's conduct under regulatory standards applied in the light of antitrust principles. *See Mt. Hood Stages, Inc.,* 104 M.C.C. 449, 458, 460-63 (1968) (citing *Marnell v. United Parcel Service of America, Inc.,* 260 F.Supp. 391 (N.D. Cal.1966)).

14. *Quoting United States v. Philadelphia Nat'l Bank,* 374 U.S. 321, 350-51, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963). *See International Tel. & Tel. Corp. v. General Tel. & Elec. Corp.,* 518 F.2d 913, 918-19 (9th Cir. 1975).

The remedies afforded under the two statutes have also meshed. The injunction issued in enforcement of the regulatory determination was not duplicated in the antitrust proceeding. In assessing the penalty for contempt for violation of that injunction, the court was careful to avoid the possibility of double damages. *See United States v. Greyhound Corp., supra,* 370 F.Supp. at 888. The losses sustained by Mt. Hood during the contempt period (approximately February 5, 1970, to March 15, 1973, see *id.* at 884 n. 2) were only a small part of the total damages Mt. Hood sustained from the inception of Greyhound's wrongful conduct in 1947. The remaining damages could be and were recovered only in the antitrust action. Trebling the damages —an effective support for the competitive policy reflected in both statutes—could be and was accomplished only in the antitrust proceeding. Since the transactions involved offended the policies of both statutes and those policies were advanced and not impaired by the application of both statutes, it is reasonable to assume Congress would have intended both to apply.

Greyhound leans heavily upon *Hughes Tool Co. v. Trans World Airlines, Inc.,* 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973). From this decision Greyhound draws the general principle that when antitrust immunity is conferred by a statute upon participants in an acquisition approved by a regulatory agency, the immunity extends to conduct made possible by the acquisition whether or not the conduct itself was approved, at least where the agency considered the possibility such conduct might occur and retained continuing jurisdiction to regulate it in the public interest. But antitrust exemption is implied "*only* to the *minimum* extent necessary" to make the regulatory scheme work (emphasis added). Quoting this principle, and citing *Hughes*

Tool and *Pan American World Airways, Inc. v. United States,* 371 U.S. 296, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963), the Supreme Court recently wrote, "[W]e have implied immunity in *particular and discrete instances* to assure that the federal agency entrusted with regulation in the public interest could carry out that responsibility free from the disruption of conflicting judgments that might be voiced by courts exercising jurisdiction under the antitrust laws." *United States v. National Association of Securities Dealers, Inc.,* 422 U.S. 694, 734-35, 95 S.Ct. 2427, 2450, 45 L.Ed.2d 486 (1975) (emphasis added).

Greyhound's generalization may accommodate the facts of both *Hughes Tool* and the present case, but it omits the distinguishing particulars that made antitrust immunity appropriate in *Hughes Tool* and would make it inappropriate here. The crux of the distinction between the two cases is that, as the Supreme Court viewed the record in *Hughes Tool,* the regulatory agency involved had considered the type of conduct which underlay the antitrust complaint and had approved it as in the public interest;[15] a successful antitrust suit therefore necessarily would have been repugnant to operation of the regulatory scheme. The opposite is true in this case: the Interstate Commerce Commission did not contemplate Greyhound's challenged conduct as likely to occur and thus did not approve such conduct when it approved the acquisitions.[16] The Commission also subsequently disapproved that conduct.

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15. *See In re REA Express, Inc.,* 412 F.Supp. 1239, 1261 (E.D. Pa. 1976); *Air Freight Haulage Co. v. Ryd-Air, Inc.,* 408 F.Supp. 446 (S.D.N.Y. 1976).

16. *See Scroggins v. Air Cargo, Inc.,* 534 F.2d 1124, 1131 (5th Cir. 1976).

In *Hughes Tool* the Civil Aeronautics Board issued orders approving acquisition of control of TWA by Hughes Tool Co. The applicable statute relieved persons affected by such an order from operation of the antitrust laws so far as necessary "to do anything authorized, approved or required by such order." Section 414, Federal Aviation Act, 49 U.S.C. § 1384. The agency-authorized control later ended, and an antitrust suit was brought by TWA against Hughes Tool Co. based upon transactions between the two during the period of Hughes Tool Co.'s control. The antitrust complaint alleged, in effect, that the controlling company had exercised its control to dictate the completion of the transactions in a way that injured the controlled company.

Hughes Tool Co.'s control of TWA was acquired in two steps—an initial acquisition of 45.6 percent of TWA's stock, and a later acquisition increasing Hughes Tool Co.'s holdings to 80 percent. Both acquisitions were approved by the Board. In hearings related to the second acquisition the Board examined the manner in which Hughes Tool Co. had exercised its *de facto* control over TWA in the earlier period, particularly with respect to the acquisition of new flight equipment, which was the subject matter of the transactions on which the antitrust suit was based. The Board conceded allegations of abuse of the kind alleged in the antitrust complaint. Nonetheless, the Board concluded that continuation and enhancement of Hughes Tool Co.'s control was in the public interest. Moreover, the Board's order required that all substantial sales transactions between the two companies be submitted to the Board for approval, and, pursuant to this requirement, the transactions upon which the antitrust complaint rested were submitted to the Board and approved as in the public interest.

The Supreme Court noted that the subject matter of the Board's approval had been the acquisition and exercise by Hughes Tool Co. of control over the same kind of transactions as those at issue. *Hughes Tool, supra*, 409 U.S. at 386, 93 S.Ct. 647. By its approval the Board had determined that such control was in the public interest and consistent with the regulatory statute's prohibitions against monopoly and restraining competition. Sections 102(c) and 408(b), Federal Aviation Act, 49 U.S.C. §§ 1302(c) and 1378(b).[17] The Court further noted that the Board had also approved the very transactions underlying the antitrust suit as meeting the same standard. 409 U.S. at 379, 387, 93 S.Ct. 647.

An antitrust suit challenging these transactions, the Court said, would seek "to negate what the Board, after full investigation, had found consistent with § 408's anti-monopoly provision, consistent with § 102's competition standard, and consistent with the public interest." *Id.* at 388, 93 S.Ct. at 661. TWA's antitrust suit sought "to terminate a relationship the continuation of which the Board had found essential to both TWA and the public interest and to penalize the type of conduct which the Board expressly contemplated and preferred would continue unless and until a different order from the Board was forthcoming." *Id.*[18]

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17. Acquisition of control of one company by another necessarily contemplates exercise by the parent of control over the internal business operations of the subsidiary. When the agency has approved acquisition of control, exclusive agency jurisdiction over its exercise is more readily implied. *See Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 385-86, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973), *citing Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963), as such a case.

18. *See also Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 309, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963).

The Court concluded that the transactions were exempt from suit under the Sherman Act.[19]

In sum, in *Hughes Tool*, the propriety under the regulatory statute of the activity challenged in the antitrust suit (control by Hughes Tool Co. of the manner in which its TWA subsidiary acquired new aircraft) was the central issue presented to the agency for consideration in the

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19. The Court summarized its holding in almost identical language at two points in the opinion:

At pages 387-88, 93 S.Ct. at page 661, the Court said:

> We repeat, however, what we said in the *Pan American* case that the Federal Aviation Act does not completely displace the antitrust laws. . . . But where, as here, the CAB authorizes control of an air carrier to be acquired by another person or corporation, and where it specifically authorizes as in the public interest specific transactions between the parent and the subsidiary, the way in which that control is exercised in those precise situations is under the surveillance of the CAB, not in the hands of those who can invoke the sanctions of the antitrust laws. As noted, the parent company which controls an air carrier is subject to pervasive control by the CAB. The control which the CAB is authorized to grant or to deny under § 408 involves an appraisal of the impact of that control in terms of monopoly and competition; and the ongoing supervision entrusted to the CAB by § 415 is broad enough to put all transactions between parent and subsidiary—as originally conceived or subsequently exercised—under CAB supervision.

And again at page 389, 93 S.Ct. at page 661-662:

> We by no means hold that the Federal Aviation Act completely displaces the antitrust laws. *Pan American*, 371 U.S., at 305, [83 S.Ct. at 482]. But where, as here, the CAB authorizes control of an air carrier to be acquired by another person or corporation, and where the CAB specifically authorizes as in the public interest specific transactions between the parent and the subsidiary, the way in which that control is exercised in those precise situations is under the surveillance of the CAB, not in the hands of those who can invoke the sanctions of the antitrust laws. The control which the CAB is authorized to grant or to deny under § 408 involves an appraisal of the impact of that control in terms of monopoly and competition; and the ongoing supervision entrusted to the CAB by § 415 is broad enough to put all transactions between parent and subsidiary—as originally conceived or subsequently exercised—under CAB supervision.

exercise of its regulatory authority, and the agency had resolved the issue by approving such control as in the public interest. Exemption from the antitrust laws was implied because a successful application of the antitrust laws to the conduct would have negated the regulatory agency's determination and faced the regulated carrier with inconsistent governmental commands. In the present case, as has been seen, the premise of inconsistent regulatory and antitrust demands is absent. Also unlike *Hughes Tool,* the instant suit is not brought by a subsidiary against its parent and does not challenge the effect on the acquired company of the daily intercompany control that was integral to the acquisition. *See also Pan American World Airways v. United States*, 371 U.S. 296, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963). Rather, the instant suit is brought by a third party to the approved acquisitions, challenging conduct with regard to the third party that not only was not integral to the Commission's acquisition approvals but was violative of specific representations made by Greyhound at the acquisition hearings. In these circumstances, Greyhound's conduct is not immune from antitrust strictures.

II.

Jury Instructions and Admission of Evidence

Many of Greyhound's assertions of error in evidentiary rulings and instructions rest upon Greyhound's theory of antitrust immunity and fall with it.

Greyhound complains of the district court's "failure to instruct on Section 5(11)." It is not clear precisely what Greyhound has in mind. The extent to which Greyhound's conduct was exempt from the antitrust laws by the Interstate Commerce Act was a legal question, not an issue of

fact for the jury.[20] The instructions proposed by Greyhound were properly rejected for this reason and because they reflected Greyhound's uncompromising position that the acquisitions approved by the Commission and all conduct involving exercise of control over the acquired carriers were exempt from the antitrust laws and were not to be considered by the jury for any purpose whatever.[21]

The court was required to provide the jury with standards to apply in determining whether Greyhound was liable under the antitrust laws, and it did so. The court defined the elements of monopolization, attempt to monopolize and unreasonable restraint of trade in the usual way, and Greyhound does not object to these instructions in themselves. The court also told the jury that the fact that Greyhound was regulated affected what activities of Greyhound were subject to the antitrust laws; that in a regulated industry

20. *See Gordon v. New York Stock Exch., Inc.*, 422 U.S. 659, 688, 95 S.Ct. 2598, 45 L.Ed.2d 463 (1975).

21. For example, Greyhound requested an instruction that since the Commission had approved the acquisitions, "the manner in which defendants have used or exercised the control of these carriers" was within the exclusive jurisdiction of the Commission, and therefore the jury "must exclude from [its] consideration all conduct by defendants involving exercise of control over the acquired bus companies." Greyhound also requested instructions referring to the specific conduct the Commission had condemned, and telling the jury that regulation of such conduct was within the exclusive jurisdiction of the Commission and could not be the basis of any findings by the jury.

In addition, Greyhound requested an instruction essentially in the words of the statute, telling the jury that the antitrust laws did not apply to the approved acquisitions "or to anything done by defendants which was necessary to hold, maintain or operate the properties or operating rights obtained in these approved transactions." Since the scope of the immunity conferred by the statute was a legal question for the court to decide, this instruction was properly refused. *See* note 20, *supra*, and related text. The court's decision as to the scope of the statutory immunity shaped and conditioned the court's instructions spelling out what facts the jury must find before Greyhound could be held liable.

the existence of monopoly power was not evidence of monopolization, but "use of monopoly power even if lawfully acquired, to foreclose or restrain competition, to gain a competitive advantage or to eliminate a competitor" was such evidence.[22] Under these instructions the jury could not base a finding of monopolization on the approved acquisitions themselves; improper use of the acquired power was required. This was at least as favorable to Greyhound as the law warranted.

Greyhound objects to the admission of evidence regarding the administrative and related court proceedings, and to jury instructions that this evidence could be considered "in determining the issue of Greyhound's motive, intent and purpose and reasonableness of its behavior." Greyhound objects on several grounds, but primarily on the basis of Greyhound's immunity argument, which we have rejected. Greyhound's other objections are also without merit.[23] The

22. The quoted portion of the instruction is settled law. *See Otter Tail Power Co. v. United States*, 410 U.S. 366, 377, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973); *United States v. Griffith*, 334 U.S. 100, 107, 68 S.Ct. 941, 92 L.Ed. 1236 (1948). Indeed, section 2 is violated if exclusionary tactics are used to maintain a lawfully acquired monopoly. *Industrial Building Materials, Inc. v. Interchemical Corp.*, 437 F.2d 1336, 1344-45 (9th Cir. 1970), *interpreting United States v. United Shoe Machinery Corp.*, 110 F.Supp. 295, 343 (D.Mass. 1953), *aff'd per curiam*, 347 U.S. 521, 74 S.Ct. 699, 98 L.Ed. 910 (1954). *See also TV Signal Co. v. American Tel. & Tel. Co.*, 462 F.2d 1256, 1261 (8th Cir. 1972).

23. One of these additional grounds of objection warrants brief comment. Greyhound argues that the instructions permitting use of evidence of the administrative proceedings in determining Greyhound's intent and the reasonableness of its conduct "infringe" Greyhound's constitutional privilege to seek relief before administrative agencies, *citing Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961). But "[i]t is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute." *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 514, 92 S.Ct. 609, 613, 30 L.Ed.2d 642 (1972). The antitrust laws have

evidence was properly used for the purpose stated by the court.

The lengthy instructions contained two brief passages apparently inspired by *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 177, 86 S.Ct. 347, 15 L.Ed.2d 247 (1965), and *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972). Greyhound argues that these passages permitted imposition of liability if the jury found no more than that Greyhound had perpetrated a fraud on the Commission or had acted in bad faith in the administrative and related judicial processes, rendering those processes ineffective. Even considered alone, however, both passages also required the jury to find, as a condition of liability, that the fraud or abuse of process resulted in an administrative order that conferred a monopoly or an unreasonable competitive advantage upon Greyhound. At most, therefore, the only question raised by these passages is whether the doctrine of *Walker Process* applies outside the patent field.

When the passages are read in light of the parties' contentions, the evidence in the case, and the instructions as a whole, however, we do not believe they present even this issue. Mt. Hood did not contend that the acquisitions themselves or the power Greyhound gained through them, standing alone, constituted a violation of the antitrust laws. Mt. Hood relied instead upon Greyhound's exclusionary practices made possible by the acquisitions. The instructions were generally to the same effect. The jury was not instructed on any theory that Greyhound's purchase of other carriers might constitute the unlawful acquisition of monopoly power. On the contrary, as we have seen, the jury was told that in such a regulated industry the mere possession of monopoly power did not violate the Sherman Act, and that abuse of monopoly power to eliminate competition was required. The only fraud or abuse of process presented by the evidence was that Greyhound represented to the Commission that it was not using and would not use any of the acquired routes to engage in the predatory practices we have outlined earlier, and that Greyhound nonetheless did so. Since these same predatory practices underlay Mt. Hood's antitrust claim, since the instructions also conditioned liability upon a finding of monopolization or unreasonable restraint of competition defined in the usual way, and since the judge properly ruled without submitting the issue to the jury that Greyhound's challenged conduct was not immunized from antitrust attack, the passages amounted to no more than a reiteration in another form of the general instruction that unreasonable restraint of competition or use by Greyhound of monopoly power to foreclose or restrain competition would violate the antitrust laws.[24]

Greyhound attacks the use made at trial of two antitrust consent decrees entered into by Greyhound and the United States. The decrees, which were admitted in evidence, prohibited Greyhound from refusing to establish through-routes with competitors and from continuing other prac-

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been applied in many factual contexts that included utilization of administrative processes by the antitrust violator. *See, e.g., Otter Tail Power Co. v. United States,* 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973); *Aloha Airlines, Inc. v. Hawaiian Airlines, Inc.,* 489 F.2d 203 (9th Cir. 1973).

24. Thus even if appellant was entitled to an instruction that "fraud" must be proven by "clear and convincing" evidence, as Greyhound urges, failure to give it was harmless under Fed.R.Civ. P. 61.

tices the same as or similar to those charged in this suit. The jury was told it could consider the decrees and Greyhound's conduct with respect to obeying or disobeying them in determining the issue of Greyhound's intent and purpose and the reasonableness of Greyhound's behavior.

A trial judge must be accorded "wide latitude" in determining the relevance of evidence in antitrust cases. *Grey v. Shell Oil Co.*, 469 F.2d 742, 751 (9th Cir. 1972). The admissibility of a consent decree is a matter committed to the court's discretion. See *Control Data Corp. v. IBM Corp.*, 421 F.2d 323, 326 (8th Cir. 1970). *See also Vitagraph, Inc. v. Perelman*, 95 F.2d 142, 146 (3d Cir. 1938). There was no abuse of discretion here. The court warned the jury of the limitations implicit in decrees entered into by consent, and confined their use to a proper purpose.

Greyhound's claim that the jury should not have been asked to determine whether Greyhound had a dominant share of the market because Greyhound's market share resulted from ICC-approved transactions is but another reflection of Greyhound's rejected theory of immunity.

Other objections to the instructions regarding the relevant market are without merit. While it is true that the court did not refer to the "interchangeability of services" in those terms, the court accomplished the same purpose by use of illustrations and by instructing the jury that a "relevant" market must be one for a "distinct service" with "peculiar characteristics," serving "distinctive purposes," with "dissimilar" price characteristics, and relatively "insensitive to price variations," so that an increase in bus fares would not result in large numbers of customers switching to other forms of intercity transportation. If these indices of distinctness were not found, the jury was told,

intercity bus transportation would not constitute a relevant market for antitrust purposes.[25]

III.
Statute of Limitations

The jury awarded Mt. Hood damages for injuries sustained from 1953 to 1973. The applicable statute of limitations, 15 U.S.C. § 15b, bars all claims on which suit is not commenced within four years after they accrue—in this case, all claims that accrued before July 5, 1964, since Mt. Hood's suit was filed on July 5, 1968. However, Mt. Hood asserts that the running of the limitations period was suspended from 1953 to 1960 by Greyhound's fraudulent concealment of its wrongdoing, and from 1964 to the date of suit by the intervention and participation of the United States in the section 5(9) proceedings brought by Mt. Hood before the Commission.[26]

In accordance with the universal rule, our circuit holds that fraudulent concealment of the existence of an antitrust cause of action tolls the four-year statute of limitations

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25. Greyhound contends the jury was instructed as to several contentions for which there was no evidentiary support. We have examined the record with respect to each of these issues and conclude that either there was sufficient evidence to justify an instruction or the instruction was harmless under Fed.R.Civ.P. 61.

26. *See* note 4, *supra*, and related text. The period of fraudulent concealment and the government intervention tolling period can be "tacked" or "bridged" to suspend the statute for the entire period since the time between the two did not exceed four years, albeit short by only a day. *See, e.g. City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 460-61 (2d Cir. 1974); *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561, 567-72 (10th Cir. 1962); *Maricopa County v. American Pipe & Constr. Co.*, 303 F.Supp. 77, 84-86 (D.Ariz.1969), *aff'd*, 431 F.2d 1145 (9th Cir. 1970).

provided by section 15b.[27] The jury found Greyhound had fraudulently concealed its antitrust violations from 1953 to December 14, 1960, and that Mt. Hood neither knew nor should have known of these violations prior to December 14, 1960.

Greyhound does not deny the sufficiency of the evidence to show it attempted to conceal its conduct. It argues, however, that Mt. Hood had notice of Greyhound's activities long before December 14, 1960.

The record shows that Mt. Hood complained about quoting and routing practices of Greyhound agents on various occasions during the 1953-1960 period. The record also shows, however, that Greyhound continuously represented to Mt. Hood and to the Commission that these were isolated incidents not countenanced by Greyhound's management.[28]

The record shows that Mt. Hood suspected Greyhound of unlawful conduct prior to December 14, 1960, but "[s]uspicion will not substitute for knowledge of facts from which fraud could reasonably be inferred." *Friedman v. Meyers*, 482 F.2d 435, 439 (2d Cir. 1973).

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27. *Westinghouse Elec. Corp. v. Pacific Gas & Elec. Co.*, 326 F.2d 575 (9th Cir. 1964); accord. *Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp.*, 546 F.2d 570 (4th Cir. 1976); *Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389 (6th Cir. 1975); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974); *Crummer Co. v. Du Pont*, 255 F.2d 425 (5th Cir. 1958).

28. Greyhound argues that such representations, denials, and other attempts at concealment are immaterial citing such cases as *Foster & Kleiser Co. v. Special Site Sign Co.*, 85 F.2d 742, 752 (9th Cir. 1936); *Feak v. Marion Steam Shovel Co.*, 84 F.2d 670, 673 (9th Cir. 1936). But as these cases demonstrate, attempts at concealment lose their relevance only when they occur after plaintiff already knew or should have known of the unlawful conduct. In the present case the jury weighed the evidence and concluded that, in part because of Greyhound's attempts at concealment, Mt. Hood neither knew or should have known of Greyhound's antitrust violation.

There was evidence that Mt. Hood's president expressed concern over Greyhound's expansion by acquiring other carriers, and that he also stated his belief that the consent decrees were being violated. Awareness of Greyhound's growing dominance of the market was not equivalent to notice of monopolization, however, for the acquisitions were approved by the Commission and presumably immunized from the antitrust laws. Nor was knowledge of violations of the consent decrees equivalent to such notice, for, as Greyhound itself is careful to point out, violations of consent decrees are not in themselves violations of the antitrust laws.

Greyhound asserts that Mt. Hood was charged with the duty to investigate once it became aware of facts from which antitrust violations should reasonably have been inferred.[29] But in the face of Greyhound's assurances and denials of responsibility, we cannot say as a matter of law that Mt. Hood's awareness of the growth of Greyhound's power through acquisitions and of the commission of predatory acts by some of Greyhound's agents amounted to notice of potential antitrust claims against Greyhound.

We conclude, therefore, that the trial court properly refused to set aside the jury's determination that Greyhound fraudulently concealed its antitrust violation, and that Mt. Hood had neither actual nor constructive knowledge of the violation until December 14, 1960.

Four years later, on December 14, 1964, one day before Mt. Hood's antitrust claim would have been barred, the United States intervened in the section 5(9) proceedings Mt. Hood had instituted before the Commission in October, 1964. The trial court held that, under the provisions of

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29. *See* note 28, *supra*, and cases cited therein.

15 U.S.C. § 16(i), the intervention and the subsequent participation by the United States in the Commission proceedings tolled the running of the statute of limitations until those proceedings terminated in 1974, well after the filing of the present suit.

Section 16(i) provides that running of the limitations period on a private cause of action is suspended during the pendency of "any civil or criminal proceeding . . . instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws."[30] Greyhound argues that section 16(i) is inapplicable because the administrative proceedings were not "instituted by the United States" and because they were not proceedings "to prevent, restrain, or punish violations of any of the antitrust laws."

The literal wording of section 16(i) is not controlling. Where one possible interpretation of the language would effect the congressional purpose and another defeat it, the former is to be adopted. *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 321, 85 S.Ct. 1473, 14 L.Ed.2d 405 (1965). The clearly expressed purpose of section 16(i) is to further effective enforcement of the antitrust laws by permitting private litigants to have the benefits that may flow from governmental antitrust enforcement efforts. *Id.* at 320, 85 S.Ct. 1473. This purpose would be served by interpreting section 16(i) to encompass the government's intervention and participation in the section 5(9) proceedings before the Commission—a reading the language readily permits.

The proceedings were of a kind likely to produce benefits to Mt. Hood as a plaintiff in a subsequent antitrust suit.[31] The issues, as we have seen, were largely the same. Governmental investigative and legal resources were made available to fully develop the facts and the law favorable to the common position of the government and Mt. Hood on these issues. The successful resolution of these issues was critical to the defeat of Greyhound's claim of antitrust immunity.

It would make form controlling to hold section 16(i) inapplicable merely because Mt. Hood rather than the United States instituted the proceedings. The United States intervened little more than 60 days after the filing of Mt. Hood's petition and participated actively in all subsequent stages of proceedings that required nearly a decade to complete. Nothing would be gained, and a good deal of judicial and administrative time and efficiency would be lost, if the United States were compelled to institute a separate independent proceeding in district court under 15 U.S.C. § 26

30. 15 U.S.C. § 16(i) reads in part:

> Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws . . . the running of the statute of limitations in respect of every private or State right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however*, That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 or 15c of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

31. The question is not whether the government proceedings actually conferred benefits upon the private antitrust plaintiff, but whether the character of the proceedings was such that they were likely to do so. Thus in analyzing the issue the Supreme Court spoke of government action which "may aid the private litigant." *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 319, 85 S.Ct. 1473, 14 L.Ed.2d 405 (1965). If actual benefit were the test, it might be impossible to determine whether the government proceedings would toll the running of limitations until those proceedings were finally concluded. Private plaintiffs would be compelled to file their antitrust suits although government proceedings involving the same subject matter were still in progress.

to assure private treble damage litigants the benefits Congress intended they should have from the government's action. As the trial court concluded, "the Congressional intent behind [16(i)] is better served by treating intervention by Antitrust Division lawyers as the functional equivalent of a direct action by them."

In addition to relying on the language of the statute, Greyhound argues that section 16(i) applies only when the United States initiates rather than intervenes in a proceeding because of the Supreme Court's statement in *Minnesota Mining* that the purpose of section 16(i) is to permit private parties the benefit of *"prior government actions."* 381 U.S. at 320, 85 S.Ct. 1473 (emphasis by Greyhound). Obviously, the Court was referring only to actions occurring before the antitrust suit was commenced. Greyhound's argument epitomizes the kind of "grudging interpretation" which "would collide head-on with Congress' basic policy objectives." *Id.*

When the substance of the government's intervention and participation before the Commission is examined, it falls fairly within the class of proceedings "to prevent, restrain, or punish violations of any of the antitrust laws" to which section 16(i) applies. It is not controlling that the government's action was taken in an administrative rather than judicial setting, *Minnesota Mining, supra,* 381 U.S. at 320, 85 S.Ct. 1473, nor that the proceedings were not brought under the antitrust laws, *Luria Steel & Trading Corp. v. Ogden Corp.,* 484 F.2d 1016, 1020-21 (3d Cir. 1973); *Rader v. Balfour,* 440 F.2d 469, 473 (7th Cir. 1971). The government action suspends the running of the limitation period under section 16(i) if it "is directed at alleged conduct which appears to involve an existing or incipient violation of the antitrust laws," *Rader v. Balfour, supra,*

440 F.2d at 473, for it is government participation in such a proceeding that is likely to produce the benefits that Congress intended plaintiffs in later private treble damage actions to have.

The government's petition to intervene demonstrates that its interest lay in the possibility of antitrust violations should Mt. Hood's allegations prove correct. To explain its interest in the proceedings and its desire to participate as a party, the government stated:

> The allegations of the petition of Mt. Hood Stages, Inc. make a serious charge: that Greyhound has been permitted through the series of acquisitions the Commission approved in these proceedings to extend its system in all directions around Mt. Hood; that Greyhound has now begun to route around Mt. Hood over all Greyhound's routes traffic which it used to interchange with Mt. Hood or handle in through buses over shorter and quicker routes and to engage in numerous other acts and practices which as they are described in Mt. Hood's petition (pp. 8-9) have in the aggregate the appearance of a studied effort to force Mt. Hood out of business. . . .

The petition noted Mt. Hood's increasing vulnerability to and dependence on Greyhound. It referred to Greyhound's "predatory conduct" and to the possibility of Mt. Hood's "extinction at the hands of an infinitely more powerful rival." The petition concluded:

> Behind the immediate issues before the Commission are further issues of applicability of the antitrust laws. The Commission's approvals of the acquisitions relieved Greyhound and its officials from accountability under these laws only to the extent necessary to put the acquisitions into effect. While actions taken to give effect to the acquisitions are completely immune, exer-

> cise of economic power the acquisitions conferred so as to isolate and destroy a competitor is not.

As Greyhound itself admitted before the district court in its motion to dismiss the complaint, a purpose of the Justice Department's intervention was "to assure the adequate consideration of antitrust issues."

Antitrust issues were an appropriate part of the proceedings. The Commission was required to consider the anticompetitive effects of the section 5(2) transactions in framing, and modifying, its order.[32] Early in the proceedings Greyhound was reminded "that the antitrust laws and the national transportation policy . . . offer certain broad guidelines to be kept in mind in determining this proceeding." *Mt. Hood Stages, Inc., supra,* 104 M.C.C. at 451. The Commission rested its decision upon the conclusion that Greyhound's conduct "constitutes destructive competition in contravention of the national transportation policy." *Id.* at 463.[33] In sustaining the Commission's order the district court wrote:

> It is inconceivable to us that Congress intended that destructive practices made possible by acquisition approvals may not be corrected by supplemental order under Section 5(9), especially in light of the ICC's

32. *Port of Portland v. United States,* 408 U.S. 811, 841, 92 S.Ct. 2513, 33 L.Ed.2d 723 (1972); *Northern Lines Merger Cases,* 396 U.S. 491, 511-16, 90 S.Ct. 708, 24 L.Ed.2d 700 (1970); *McLean Trucking Co. v. United States,* 321 U.S. 67, 83-87, 64 S.Ct. 370, 88 L.Ed. 544 (1944).

33. The Commission rejected Greyhound's argument that Greyhound's practices were not in themselves unlawful on the basis of the antitrust principle that "actions which are not in themselves unlawful may be unlawful when they are part of a plan to monopolize or restrain commerce." *Mt. Hood Stages, Inc.,* 104 M.C.C. 449, 458 (1968). The Commission cited the Sherman Act case of *Marnell v. United Parcel Service of America, Inc.,* 260 F.Supp. 391 (N.D.Cal.1966).

> duty to take the antitrust policy of the United States into account in its decision making.

Greyhound Lines, Inc. v. United States, supra, 308 F.Supp. at 1038.

Because Congress' purpose in enacting section 16(i) will be served by this interpretation, and because the language of the section does not bar it, we conclude that the government's intervention in the section 5(9) proceedings on December 14, 1964, tolled the running of the limitations period from that date.[34] Accordingly, Mt. Hood's antitrust complaint was timely filed.

IV.

Damages and Attorneys' Fees

Greyhound contends that Mt. Hood failed to offer adequate proof either that Mt. Hood was injured by Greyhound's conduct or of the amount of the damage. With respect to the fact of damage, Greyhound's claim is frivolous. The jury may infer the fact of damage if "plaintiff proves a loss, and a violation by defendant of the antitrust laws of such a nature as to be likely to cause that type of loss." *Continental Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. 690, 697, 82 S.Ct. 1404, 1409, 8 L.Ed.2d 777 (1962). Mt. Hood offered evidence that its bridge traffic declined sharply during the relevant period.[35] Greyhound's

34. We need not reach Mt. Hood's contention that the statute was tolled to December 14, 1960, by virtue of Mt. Hood's commencement of the section 5(9) proceedings.

35. Mt. Hood offered evidence, for example, that Mt. Hood's bridge traffic consisted of 25,258 passenger trips, or approximately 44 percent of the total relevant bridge traffic, in 1963 and had fallen to 930 passenger trips, or approximately three percent of the total, by 1969.

conduct found to violate the antitrust laws was directed at creating precisely this kind of loss.[36] There was no indication of an alternative source of loss sufficient to negate an inference that Greyhound's violation was a material cause. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n. 9, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969).

Mt. Hood's proof of the amount of damage was less certain and necessarily so. What Mt. Hood's business volume and profits would have been except for Greyhound's antitrust violation is inescapably uncertain. *See Flintkote Co. v. Lysfjord*, 246 F.2d 368, 391 (9th Cir. 1957). In such a case, the amount of damages may be shown "as a matter of just and reasonable inference, although the result be only approximate." *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563, 51 S.Ct. 248, 249, 75 L.Ed. 544 (1931).

The premise of Mt. Hood's calculation of lost profits was that 95 percent of bus passengers would have traveled Mt. Hood's shorter bridge routes if they had had that choice. Greyhound asserts that Mt. Hood's premise "defies the record as well as common sense and is untenable," and therefore the entire calculation of damage fails. There was ample evidence from which the jury could reasonably infer that the shortest bus route is generally fastest, including studies comparing Greyhound's and Mt. Hood's schedules

---

36. As described previously, Mt. Hood alleged and offered substantial evidence to prove that Greyhound had cancelled the north-south through-bus connection arrangement on which Mt. Hood depended for a substantial portion of its traffic, scheduled its services so as to preclude reasonable connections with Mt. Hood, directed independent and joint ticket agents to long-haul traffic around Mt. Hood, and interfered with distribution of Mt. Hood schedules.

from 1950 to 1970 with regard to mileage and time.[37] Mt. Hood also introduced evidence from which the jury could reasonably infer that as a general rule 95 percent of bus passengers would take the fastest route when given a choice.[38] It is of course true that the evidence did not demonstrate to a certainty that 95 percent of passengers would have traveled Mt. Hood's shorter routes absent the restraints imposed by Greyhound's violation, but in the nature of the case proof to a certainty is not possible and is not required.

Greyhound challenges virtually every other facet of Mt. Hood's proof of damage. We have examined each of Greyhound's objections in light of Mt. Hood's response and the evidence in the record. No useful purpose would be served by a tedious recapitulation of these materials. We are satisfied that the evidence offered by Mt. Hood permitted the jury to make a reasonable and just inference of the amount of Mt. Hood's damage.[39]

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37. These studies were part of a larger damage study commissioned by Mt. Hood. The study was supplemented by the testimony of three expert witnesses over a two-week period. The study was based on statistical computations verified by Arthur D. Little & Co., an independent management consulting firm. Mr. Jizmagian, Arthur D. Little & Co.'s representative who supervised the study, testified that maximum use was made of all available data supplied by Greyhound and where such data was not available every assumption and method "and every use of statistics and every use of ratios was done . . . with standard statistical techniques and there was, in my opinion, no speculative use of numbers." He concluded that the study accurately reflected Mt. Hood's damages.

38. For example, Mt. Hood's damage study, *see* note 37, *supra*, included a comparison of passenger utilization of three available "'All Greyhound' routes from Oregon and Washington points to Los Angeles," showing that more than 95 percent of the bus passengers chose the shortest of the three available routes.

39. This holding also encompasses the damage awards for express traffic Mt. Hood lost between 1964 and 1971, and for local traffic it lost between 1964 and 1970.

We also sustain the award of attorneys' fees. Greyhound objects that the amount of the award divided by the number of hours devoted to the litigation by plaintiff's attorneys yields an exorbitant hourly rate. But as the experienced trial judge stated, "compensation at an hourly rate would be inadequate in a case of this kind," which "is, in many ways, unusual . . . its complexity and difficulty set it apart from the common run of antitrust cases, if such a category in fact exists." The trial court based the award upon knowledge gained in four years' involvement in all aspects of the case, the evidence presented by the parties on this issue, and the factors prescribed in *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190 (9th Cir. 1964). The award represented an appropriate exercise of the district court's discretion.

Affirmed.

United States Court of Appeals

for the Ninth Circuit

No. 74-1282

Mt. Hood Stages, Inc., dba Pacific Trailways,
Plaintiff-Appellee,

v.

The Greyhound Corporation and
Greyhound Lines, Inc.,
Defendants-Appellants.

[August 3, 1977]

ORDER

Before: BROWNING and WRIGHT, Circuit Judges, and
*LINDBERG, District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

---

*Honorable William J. Lindberg, Senior United States District Judge, Western District of Washington, sitting by designation.

Supreme Court of the United States

No. 77-598

The Greyhound Corporation, et al.,
Petitioners,

v.

Mt. Hood Stages, Inc., etc.

ORDER ALLOWING CERTIORARI. Filed January 9, 1978

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, limited to Question 3 presented by the petition.

Supreme Court, U. S.
FILED
NOV 25 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-598

THE GREYHOUND CORPORATION AND GREYHOUND LINES, INC.,
Petitioners,

vs.

MT. HOOD STAGES, INC.,
doing business as PACIFIC TRAILWAYS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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In the Supreme Court
OF THE
United States

October Term, 1977

No. 77-598

The Greyhound Corporation and Greyhound Lines, Inc.,
Petitioners,

vs.

Mt. Hood Stages, Inc.,
doing business as Pacific Trailways,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (App. A to Petition), affirming the decision of the District Court (App. C to Petition), is officially reported at 555 F.2d 687.

STATUTES INVOLVED

Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1, 2) are set forth in Appendix B hereto.

QUESTIONS PRESENTED

Based upon the evidence adduced at trial, the verdict of the jury and the rulings of the trial court and of the Court of Appeals, Mt. Hood believes this case presents the following questions:

1. Whether the destructive competitive practices shown by the record below were "necessary" "to hold, maintain and operate" carriers previously acquired by petitioners with the approval of the Interstate Commerce Commission ("ICC").

2. Whether the existence of ICC jurisdiction over the destructive competitive practices of petitioners is sufficient to preempt the application of the treble damage provisions of the Clayton Act to practices specifically disapproved by the ICC as "contrary to the national transportation policy".

3. Whether the trial court abused its discretion in admitting evidence of consent decrees which were relevant to the issues in the case with appropriate limiting instructions.

4. Whether this Court should again review the evidence concerning the issue of fraudulent concealment after the verdict of the jury on that issue was sustained by the trial court and the Court of Appeals.

5. Whether the courts below properly concluded the statute of limitations was tolled under Section 5(i) of the Clayton Act (15 U.S.C. Section 16(i)) by reason of the Justice Department's intervention as a party in a pending ICC proceeding to prevent destructive practices in violation of both the National Transportation Policy and the antitrust laws.

6. Whether the statute of limitations was tolled by Mt. Hood's prompt resort to the ICC for rulings critical to the resolution of its antitrust claims.

STATEMENT OF THE CASE

The decision of the court below is the latest word in fourteen years of litigation before the Interstate Commerce Commission ("ICC") and the United States Courts. During that history, petitioners' conduct has been analyzed and condemned on ten separate occasions by five different tribunals: United States District Courts in Illinois and Oregon, the Courts of Appeals for the Seventh and Ninth Circuits and the ICC.[1] That conduct has been

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[1] *Mt. Hood Stages, Inc., Petition for Modification - Greyhound Mergers* (Western Mergers), 104 MCC 449, 464 (1938); Exhs. 426, 430; *Greyhound Lines, Inc. v. United States,* 301 F.Supp. 356 (N.D. Ill. 1969); *Greyhound Lines, Inc. v. United States,* 308 F.Supp. 1033 (N.D. Ill. 1970); *United States v. The Greyhound Corporation,* 363 F.Supp. 525 (N.D. Ill. 1973); *The Greyhound Corp. v. United States,* 370 F.Supp. 881 (N.D. Ill. 1974); *United States v. The Greyhound Corp.,* 508 F.2d 529 (7th Cir. 1974); *Mt. Hood Stages, Inc. v. The Greyhound Corp.,* 1973-2 CCH Trade Cases, ¶74,824 (D. Ore. 1973); *Mt. Hood Stages, Inc. v. The Greyhound Corp.,* 555 F.2d 687 (9th Cir. 1977).

adjudged (1) predatory, (2) collusive, (3) fraudulent, (4) injurious to the public interest, (5) contrary to the national transportation policy, and (6) wilfully contemptuous of ICC and District Court orders. Petitioners were held to have violated both the Interstate Commerce Act and the Sherman Act. They have been convicted of criminal and civil contempt, fined $600,000 and placed on five years probation. They were proven to have intended to destroy Mt. Hood and to have almost achieved that goal. They were shown to have caused massive damages to Mt. Hood for which the Interstate Commerce Act provides no remedy.

Nonetheless, petitioners contend they should be exonerated from antitrust liability because they operate in an industry subject to "pervasive regulation"; that they should be liberated from the consequences of their actions and Mt. Hood denied restitution for its proven injury to avoid hypothetical conflicts between antitrust and regulatory schemes. They must focus upon imagined conflicts, for the conduct involved in this case has been condemned under both frameworks. Petitioners are also forced to seriously misstate the rulings of the courts below, and to conceal the special verdict of the jury that they also violated Section 1 of the Sherman Act (15 U.S.C. §1) in order to conjure up points of law ostensibly deserving of this Court's attention. As a result, the case presented by their petition bears little resemblance to the facts and the legal issues actually dealt with by the courts below.

The parties. Mt. Hood is a "bridge carrier" of passengers and express moving between various cities located

in Oregon, Idaho and Utah (Tr. 3410).[2] Because its bridge routes are from 25% to 40% shorter than Greyhound routes, Mt. Hood has been able to provide several hours faster service than Greyhound to passengers moving between those cities (Exh. 471-A; Exh. R-7).

Greyhound Lines, Inc. operates routes and ticket sales agencies throughout the United States (Exhs. 476-8; 445). It is a wholly-owned subsidiary of the Greyhound Corporation (Exh. 473), and it controls over 80% of all intercity bus traffic in the 11 western states (Exh. 428-A). For the past 25 years, Mt. Hood has been encircled by petitioners' route structure and dependent upon them for whatever bridge traffic they chose to route over Mt. Hood's lines (Exhs. 414, 419, 425, 433, 445; Tr. 1338, 1795).

The period 1947-1960. In 1947, a consent decree was entered in *United States v. Pacific Greyhound Lines, et al.*, 1947 CCH Trade Cases ¶57,619 (N.D. Cal. 1947), requiring petitioners to discontinue various restrictive traffic agreements which they had obtained from other carriers in the western United States. Petitioners therefore embarked upon a program of acquiring all independent bus companies in the Northwest—including those carriers subject to the earlier contractual restraints. Concerned that once it became encircled petitioners might proceed to "longhaul" passengers so as to deprive Mt. Hood of the

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[2] A bridge carrier "is a carrier that lies between two territories and carries the traffic from one connecting carrier to another connecting carrier" (Tr. 2772). Mt. Hood's bridge routes are between Portland, Eugene and Albany, Oregon, on the west and Salt Lake City, Utah on the east and between The Dalles and Biggs, Oregon, on the north and Klamath Falls, Oregon, on the south (Exh. 471-A).

bridge traffic it needed to survive (Tr. 3410),[3] Mt. Hood protested the acquisitions.

To defeat Mt. Hood's protests and secure ICC approval of their acquisition program, petitioners' top officials repeatedly stated under oath that Greyhound would do nothing to discourage Mt. Hood's routes from being available to the public; that "it is not the policy of [Greyhound] to route passengers over a circuitous route over its line"; that "there is no endeavor by Greyhound to route passengers" against their preference for Mt. Hood's shorter bridge routes; that Greyhound would disclose alternative services to the passenger so as "to give the passenger his choice"; that Greyhound's "long established and jointly developed routes" with Mt. Hood "will continue"; that Greyhound policy is to require ticket agents to quote both routes so that the passenger can "make his choice of the route"; that Mt. Hood's schedules are shown in Greyhound's time folders, and Mt. Hood's routes are shown on Greyhound's maps and that both will continue; that joint through bus service with Mt. Hood "will be maintained"; that there would be no discrimination against Mt. Hood; and that the ICC and Mt. Hood can both take petitioners' assurances "as a commitment" (Exhs. 36, 45, 49, 66, 121).[4]

---

[3]To "longhaul" a passenger is to divert him over a more circuitous route, generally by withholding information or giving inaccurate information about a more direct route.

[4]Defendants' sworn representations during the acquisition program were so numerous that it is not possible to do them justice here. They are described more fully in the "Summary of Exhibits Relating to Predatory and Collusive Practices which were Fraudulently Concealed by Defendants" (R. 2443, *et seq.*) and in Appendix A to Mt. Hood's brief to the Ninth Circuit.

Greyhound's representations were relied upon by both the ICC and Mt. Hood (555 F.2d at 689; Tr. 3495-96, 3509-10, 3514), but the evidence at trial showed they were knowingly false when made. While issuing disclaimers to the ICC and Mt. Hood, petitioners had already begun plans to destroy Mt. Hood's bridge routes by predatory means. Greyhound recognized that Mt. Hood's bridge service gave passengers "a saving of up to 4 hours and 10 minutes in travel time" compared to petitioners' longer routes (Exh. 130). To make the joint through bus service "much less desirable to the public" (Exh. 131) petitioners at first planned to break schedule connections with Mt. Hood. Fearing discovery, however, petitioners elected instead to issue confidential directives that all passengers were to be longhauled around Mt. Hood's direct routes and over petitioners' circuitous routes (Exh. 131).

Petitioners did all they could to hide their longhauling activities from the ICC, Mt. Hood and the bus traveling public. Thus petitioners' management cautioned "we should be careful not to put anything in writing demanding that they [passengers] be exclusively routed over [Greyhound]" (Exh. 54); that Mt. Hood's request to independent agents that passengers be informed of its bridge routes must be countermanded but "I [Greyhound's president] don't want these instructions put in writing" (Exh. 103); that petitioners had succeeded in keeping Mt. Hood routing "at a minimum" (Exh. 94); that Greyhound officials should have "a quiet talk" with independent ticket agents concerning passengers still traveling over Mt. Hood's bridge routes (Exh. 123) but "it has to be handled carefully" as "I [Greyhound's president] prefer that it

not get into [Mt. Hood's] hands" so "I do not want any bulletins issued" (Exh. 131).

Thus while it was to be handled "aggressively" (Exh. 131),[5] Greyhound's management stressed over and over that it was also to be handled "verbally" and "confidentially" and "quietly" and that no written traces of their collusion with ticket agents were to be left for discovery by outsiders (Exhs. 124, 125, 137, 138, 150). These secret directives continued unabated through the 1950s.[6]

The period 1961-1973. Whereas their conduct during and immediately after the acquisition program (1947-1960) was covert, petitioners thereafter substantially broadened the spectrum of their destructive acts toward Mt. Hood. In early 1961, petitioners eliminated Mt. Hood's connecting service and most of Mt. Hood's local service from Greyhound time folders (Tr. 3660-75, 3861-2; Exhs. 303, 306, 384-A). As soon as Greyhound learned that Mt. Hood was seeking to develop connections with two other carriers in late 1961, Greyhound obtained rights of first refusal from them (Tr. 3694-95; Exhs. 313, 314, 315). Greyhound's president later claimed that Mt. Hood's efforts to obtain alternate bridge routes, necessitated by Greyhound's longhauling practices, had been successfully "blocked" (Exh. 315).

In 1963, petitioners' top officials intensified their plan to destroy Mt. Hood's north-south bridge route (Exhs.

[5]As to the bus passengers' preference for Mt. Hood's faster and more direct service, Greyhound's president was unmoved: "There is no use in telling me that those people demanded that they be routed over Pacific Trailways." (Exhs. 146, 149).

[6]*See* footnote 4, *supra.*

353, 356). First, they explored various methods of arbitrarily increasing Mt. Hood's costs of operations (Exhs. 345-47). Later, petitioners furnished Mt. Hood's financial statements to union officials and persuaded them to increase their wage demands against Mt. Hood during labor negotiations scheduled for May 1964 (Tr. 944-45; Exhs. 304, 308, 311, 352). Petitioners' collaboration with the union officials made a strike against Mt. Hood inevitable.

When the union struck Mt. Hood in May 1964, petitioners terminated the joint through bus and broke other schedule connections with Mt. Hood.[7] Petitioners' president assured management this stratagem would enable them to claim the joint through bus service was "broken for reasons beyond our control" (Exh. 357). Mt. Hood's bridge traffic dropped from about 25,000 passengers in 1963 to about 900 in 1968. It has never returned to its pre-1964 level (Exh. 476, App. 1).

On October 7, 1964, after petitioners refused Mt. Hood's plea to restore connections (Exh. 360), Mt. Hood filed its petition for relief with the ICC (R. 1402). On December 14, 1964, the Justice Department (Antitrust Division) petitioned to intervene for the purpose of enforcing the antitrust laws (R. 2266-73) and thereafter actively participated with Mt. Hood in all phases of that action directed at preventing Greyhound's destructive competition (R. 2266, 2418, 2426). Following a trial, the ICC (Division 3) found that Greyhound's practices were "not con-

[7]It was the joint through bus service which the Court of Appeals declared "provided better service to travelers and was profitable for both companies" (555 F.2d at p. 689) and which petitioners had assured the ICC under oath "will be maintained" (*Id.*).

sistent with the public interest," were "inconsistent with their representations made in various Section 5 proceedings" and "were inspired by a desire to stifle competition" and "injure or destroy" Mt. Hood (104 MCC at 459-63).

Petitioners then filed an action in the United States District Court in Chicago to set aside the ICC orders, and the Justice Department counterclaimed for specific enforcement thereof. A three-judge court affirmed the ICC orders and granted the injunction sought by the Government requiring defendants to discontinue their destructive practices against Mt. Hood (308 F.Supp. at 1039-40).

Petitioners still refused. Consequently on June 27, 1973, the District Court in Chicago found petitioners guilty of criminal and civil contempt for wilfully violating the three-judge court's injunction of February 5, 1970 (363 F.Supp. 525). Just two months before, on May 2, 1973, the Oregon jury in the trial court below found defendants' same conduct violated both §§ 1 and 2 of the Sherman Act (Appendix A hereto). The trial judge denied Greyhound's post-trial motions. Petitioners appealed both the Oregon and Illinois federal court judgments. Both the Seventh and Ninth Circuits unanimously affirmed the judgments below.[8]

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[8]*See* footnote 1, *supra*. As to the effect of Greyhound's predatory conduct, the District Court in Chicago declared:

> "Two direct consequences flowed from Greyhound's contempt; first, Greyhound's only competitor in the Pacific Northwest was threatened with destruction and, second, the evidence reveals that efficient bus service in the Pacific Northwest was disrupted by Greyhound's conduct. There is no doubt that large numbers of bus travelers were inconvenienced by Greyhound's contempt." (370 F.Supp. at 884)

Shortly after Mt. Hood filed its petition with the ICC for injunctive relief in 1964, Greyhound warned Mt. Hood to withdraw its petition or Greyhound "is going to keep you in Court for ten years and break you" (Tr. 3732). That was 13 years ago. In rejecting Greyhound's request to stay the ICC's cease and desist order in 1969, Judge Robson of the Northern District of Illinois declared: "It is this Court's opinion that the delay should end here" (301 F.Supp. at 360). That was 8 years ago. In denying all of Greyhound's post-trial motions, the trial judge below declared: "The litigation before the Commission has proceeded for approximately a decade with no apparent impact upon Greyhound's conduct" (1973-2 CCH Trade Cases, par. 74,924, p. 95,669). That was 4 years ago. In carrying out this program of delay, petitioners have surpassed their own expectations.

REASONS FOR DENYING THE WRIT

I. PETITIONERS' SERIOUS MISSTATEMENT OF THE CASE, STANDING ALONE, WARRANTS DENIAL OF A WRIT OF CERTIORARI

Petitioners have grossly misstated the record below in order to obtain review by this Court. Petitioners tell the Court "This is a monopolization case," it "was tried as an unfettered monopolization case" and it was "based on" acquisitions which the ICC approved (Petition at 7, 20). It is an incredible distortion for Greyhound to tell the Court that the opinions below and Mt. Hood's claim are essentially based on the approved acquisitions. The trial court expressly instructed the jury that a verdict

could not rest on the approved acquisitions and that only the wrongful exercise of market power would support a finding of liability: "The existence of monopoly power is not, in a regulated industry, evidence of a violation of §2 of the Sherman Act because the Interstate Commerce Act exempts regulated carriers from liability arising from mere possession of monopoly power" (Tr. 6753); therefore, "the violation, if any, arises from the improper use of monopoly power" (Tr. 6753).

Nowhere do petitioners acknowledge the application of §1 of the Sherman Act. Yet the jury specifically found that petitioners violated Section 1 and awarded damages for that violation (Appendix A). That finding was supported by substantial evidence and proper instructions, and is not contested here. Indeed, the Court of Appeals observed "Greyhound does not deny the sufficiency of the evidence to establish a violation of §§1 and 2 of the Sherman Act" (Petition Appendix A at 2). That evidence showed that petitioners combined and conspired (1) with numerous independent commission agents,[9] (2) with several other carriers, (3) with union officials, (4) with an ICC official, (5) with an air carrier, and with various others—all for the purpose of destroying Mt. Hood.

[9]Greyhound admits those commission agents were independent businessmen whom it had no right to control (Tr. 267-68, 370, 1496-97, 1498, 1743, 5676). Hence the Sherman Act prohibited Greyhound from conspiring with them, *Albrecht v. The Herald Co.*, 390 U.S. 140 (1968); *United States v. General Motors Corp.*, 384 U.S. 127 (1966); *Klors, Inc. v. Broadway-Hales Stores, Inc.*, 359 U.S. 207 (1959). (See R. 2528-33). This combination was horizontal as well as vertical because Greyhound operated at the same functional level as its independent commission agents. *United States v. McKesson & Robbins*, 351 U.S. 305, 312-13 (1956).

The jury's special verdict under §1 and its affirmance by the Court of Appeals vitiate petitioners' claims regarding both immunity[10] and fraudulent concealment.[11] That §1 finding provides an independent basis for the judgment below which required affirmance by the Court of Appeals and warrants this Court's denial of certiorari without more. *Cf. Goldlawr, Inc. v. Heiman*, 369 U.S. 463, at 465 n.5 (1962); *Jones v. State Board of Education*, 397 U.S. 31 (1970); *Hirabayashi v. United States*, 320 U.S. 81, 85 (1943).

II. BOTH COURTS BELOW CORRECTLY APPLIED THIS COURT'S RULINGS IN REJECTING PETITIONERS' CLAIMS TO ANTITRUST IMMUNITY

To avoid liability for the profound injury caused by their actions, petitioners ask this Court to rule that the mere existence of regulation precludes application of the antitrust laws to members of the regulated industry. Greyhound's contention that "the problem is the conflict

[10]It has been consistently held that antitrust immunity cannot be given to a combination and conspiracy to destroy a competitor, *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 387 (1973); *Georgia v. Pennsylvania R. Co.*, 320 U.S. 439, 455-57; *Pan American Airways v. United States*, 371 U.S. 296, 306 (1963), particularly if the conspiracy was also a fraud upon the regulatory agency as well as upon the victim, *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508 (1972); *Woods Exploration & Pro. Co. v. Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972). As held in *Israel v. Baxter Laboratories, Inc.*, 466 F.2d 272, 278 (D.C. Cir. 1972), "No action which impairs the fair and impartial functioning of an administrative agency should be allowed to hide behind the cloak of an antitrust exemption."

[11]*Cf. Crummer Company v. DuPont*, 255 F.2d 425, 430 (5th Cir. 1958), *cert. denied*, 358 U.S. 884 (1959), wherein fraudulent concealment was upheld despite knowledge of some acts because plaintiffs "were unable to learn of the connection between them that was essential to the existence of a conspiracy."

between competing jurisdictions" (Petition at 17) presumes both conflict and competition between the courts and the regulatory agency. Under this argument, concurrent jurisdiction automatically creates an irreconcilable conflict and ousts the courts of antitrust jurisdiction.

This Court has never held that immunity exists from antitrust damages merely because both regimes have jurisdiction over the same conduct. Nor has it held that a "pervasive" regulatory system is, as a matter of law, at irreconcilable odds with an antitrust damage award. The Court has consistently acted to accommodate the two schemes and their respective remedies in the belief that absent contrary Congressional intent, antitrust remedies apply. In determining the question of irreconcilable conflict, in each case this Court has conducted a thorough analysis of the conduct involved and the effect of the remedy sought before it is willing to find a plain repugnance between antitrust and regulatory systems. In each case, the Court has required a conflict which makes the regulatory system unworkable before immunity is found.

Blanket preemption has been rejected in favor of (a) express exemptions for particular transactions approved by the regulatory agency pursuant to express legislative mandate, *e.g., Hughes Tool Company v. Trans World Airlines,* 409 U.S. 363 (1973); *Federal Maritime Commission v. Seatrain Lines,* 411 U.S. 726 (1973); *Carnation Company v. Pacific Westbound Conference,* 383 U.S. 213, 219 (1966) or (b) implied immunity in "particular and discrete instances" [*United States v. National Ass'n of Securities Dealers,* 422 U.S. 694, 734 (1975)] where there is a "clear repugnance" between the antitrust

and regulatory standards and remedies such that relief from antitrust sanctions is necessary to make the regulatory system work. *See, e.g., Gordon v. New York Stock Exchange,* 422 U.S. 659, 691 (1975); *United States v. National Ass'n of Securities Dealers, supra,* 422 U.S. at 734; *Ricci v. Chicago Mercantile Exchange,* 409 U.S. 289 (1973); *Pan American World Airways, Inc. v. United States,* 371 U.S. 296, 309 (1963). Neither of these limited exceptions to the "fundamental national policies embodied in the antitrust laws" [*Otter Tail Power Co. v. United States,* 410 U.S. 366, 374 (1973)] applies to Greyhound's anticompetitive conduct.

A. Petitioners' Conduct Is Beyond the Scope of §5(12) of the Interstate Commerce Act

Petitioners claim exemption by virtue of §5(12) of the Interstate Commerce Act (49 U.S.C. §5(12) which expressly exempts transactions, including acquisitions, approved by the ICC from antitrust liability. The scope of that exemption is limited, however, to conduct which is "necessary" to implement the approved transaction in accordance with the terms and conditions imposed by the ICC and to thereafter hold, maintain and operate any properties or exercise any control acquired. Petitioners interpret this proviso to immunize every conceivable use of the acquired properties, no matter how collusive or predatory, because such behavior is "necessary" to petitioners' operations.

Such an expansive construction of express exemptions has been consistently disapproved by the Court. *E.g., United States v. Borden Company,* 308 U.S. 188, at 198 (1939); *United States v. McKesson & Robbins,* 351 U.S.

305, 316 (1956); *Carnation Company v. Pacific Westbound Conference, supra,* 383 U.S. at 217; *Federal Maritime Commission v. Seatrain Lines, supra,* 411 U.S. at 732-733; *United States v. National Ass'n of Securities Dealers, supra,* 422 U.S. at 720. By providing a statutory exemption, Congress has declared the limits of immunity which it intended. Those limits are to be strictly construed. *Federal Maritime Commission v. Seatrain Lines, supra,* 411 U.S. at 732-33.

Petitioners cannot seriously claim their conduct was "necessary" to carry the approved transaction into effect since "the Commission approved the acquisition in reliance upon Greyhound's commitment that the conduct underlying the antitrust complaint would not occur . . ." (Petition Appendix A, at p. 7). But if there could be any doubt as to whether such conduct was "necessary" for §5(12) purposes, that doubt must surely vanish in the light of ICC condemnation of petitioners' conduct as "destructive competition in contravention of the national transportation policy . . ." *Mt. Hood Stages, Inc.,* 104 MCC 449, 463 (1968). It was petitioners' disapproved behavior, not the approved acquisitions, which resulted in liability for antitrust damages. Those acquisitions remain immune from antitrust sanctions and only by dissembling the record below can petitioners argue their acquisitions formed the gravamen of Mt. Hood's antitrust claims. In construing the impact of §5(12) of the Interstate Commerce Act upon this case, the courts below were faithful to this Court's many decisions on express exemption. Further review by this Court is thus plainly unwarranted.

B. Petitioners' Conduct Is Not Entitled to Implied Immunity

Petitioners' arguments concerning immunity by implication are equally without merit. In each case where this Court has found an implied repeal of the Sherman Act it has held that result to be necessary to make the regulatory system work. *Gordon v. New York Stock Exchange, supra,* 422 U.S. at 691; *United States v. National Ass'n of Securities Dealers, supra,* 422 U.S. at 730, 735; *Pan American World Airways v. United States, supra,* 371 U.S. at 309-310. Thus, in *Gordon* the Court declared that

> "Only where there is a 'plain repugnancy between the antitrust laws and regulatory provisions' will repeal be implied" (422 U.S. at 682) and "only if necessary . . . and even then only to the minimum extent necessary" (422 U.S. at 683).

In each case where implied repeal has been sustained the necessity therefor resulted from potential conflict with either prior agency approval of the challenged conduct or with the agency's power to regulate the conduct prospectively. Thus in *Gordon v. New York Stock Exchange, supra,* the Court held the fixed commission rates immune because they had been "subjected to the scrutiny and approval of the SEC" and that the "degree of scrutiny and approval by the SEC is not significantly different for our purposes here than an affirmative order to the exchanges to follow fixed rates" (422 U.S. at 689 and n.13). Similarly, the vertical restraints on secondary marketing activities in *United States v. National Ass'n of Securities Dealers, supra,* were deemed to have been approved by the SEC through inaction as contemplated

by section 22(f) of the Investment Act of 1940 (15 U.S.C. §80a-22(f)) (422 U.S. at 726). The alleged horizontal restraints were immune because the challenged conduct was ". . . designed to encourage the suppression of intra-fund secondary market activities, precisely the restriction that the SEC consistently has approved pursuant to §22(f) for nearly 35 years." (422 U.S. at 733). Furthermore, in each of these cases, this Court determined Congressional intent and found the challenged practices clearly within the contemplation of Congress when the regulatory system was created.

No reported case has ever held implied immunity necessary to protect conduct which was not only not approved, but was actually condemned by the agency and in direct conflict with express commitments made to that agency by the antitrust defendant. Nor can it be argued that Congress intended to immunize Greyhound's conduct when the national transportation policy expressly prohibits "destructive competitive practices." (national transportation policy, 54 Stat. 899, 49 U.S.C. preceding §1; Appendix B hereto.)

Asserting a belated concern for the regulatory system which they contemptuously subverted for years, petitioners argue that application of the antitrust laws might conflict with the ICC's efforts to regulate petitioners' conduct. The deficiencies inherent in that abstraction when applied to this particular case were detailed by the court below when it held in accordance with this Court's well established standards:

> "No 'plain repugnancy' exists between the Interstate Commerce Act and the Sherman Act as applied to Greyhound's conduct, and it is not necessary to exempt Greyhound's conduct from antitrust restraints 'to make the [Interstate Commerce Act] work.' . . . Clearly there has been no conflict between the regulatory and antitrust regimes. On the contrary, they have accommodated and supplemented each other. The policies of both have been advanced. . . .
>
> "The remedies afforded under the two statutes have also meshed. The injunction issued in enforcement of the regulatory determination was not duplicated in the antitrust proceeding. . . . Trebling the damages—an effective support for the competitive policy reflected in both statutes—could be and was accomplished only in the antitrust proceeding. Since the transactions involved offended the policies of both statutes and those policies were advanced and not impaired by the application of both statutes, it is reasonable to assume Congress would have intended both to apply." (555 F.2d at 692)

Thus as the court below correctly observed, "the remedies . . . have also meshed," thereby further preventing conflict. The court below had no authority to enter an injunction against petitioners' conduct by the express terms of section 16 of the Clayton Act (15 U.S.C. §26),[12] while the ICC has no authority to award damages to a competitor injured by a regulated carriers' anti-competitive behavior. *Cf. Hewitt-Robbins, Inc. v. Eastern Freight-Ways, Inc.*, 371 U.S. 84 (1963). The ICC had enjoined petitioners' routing practices as unreasonable in *Hewitt-Robbins*, just as it enjoined petitioners' routing

[12]It is noteworthy that there is no comparable prohibition in section 4 of the Clayton Act (15 U.S.C. §15) creating a private right to damages arising from violations of the antitrust laws.

practices here. The Court held that ICC regulation of routing practices did not preempt a common law claim for damages, inasmuch as restitution would not hamper administration of the Interstate Commerce Act but on the contrary would accommodate the regulatory scheme.[13]

This distinction between prospective relief and restitution for past acts is a consistent thread running through this Court's implied immunity cases. *Compare, Carnation Company v. Pacific Westbound Conference, supra,* 383 U.S. at 221-222, *with Pan American World Airways, Inc. v. United States, supra,* 371 U.S. 311-312, and *United States v. National Ass'n of Securities Dealers, supra.* Consistent with *Hewitt-Robbins,* the Court in *Pan American* held that "if it were clear that there was a remedy" under the antitrust laws "not available in a §411 proceedings" the antitrust court would have jurisdiction (371 U.S. at 313 n.19).

There was in this case no conflict between the federal courts and the ICC. The damages awarded in the antitrust court will serve as a deterrent to such anti-competitive behavior by petitioners or others, thereby contributing to the ICC's regulatory efforts, *Hewitt-Robbins.* Petitioners have been required to disgorge at least in part the fruits of their wrongdoing, and Mt. Hood has been partially compensated for its virtual destruction. Both competition and the national transportation policy have been furthered. Reconciliation of the antitrust and regulatory regimes has been achieved in accordance with

[13] ". . . the allowance of misrouting actions would have a healthy deterrent effect upon the utilization of misrouting practices in the motor carrier field, which, in turn, would minimize 'cease and desist' proceedings before the Commission." (371 U.S. at 88)

the well-defined guidelines time and again announced by this Court.

III. BOTH COURTS BELOW CORRECTLY RULED THERE WAS NO PREJUDICIAL ERROR WITH RESPECT TO ADMISSION OF CONSENT DECREES

The trial court admitted petitioners' 1947 and 1957 consent decrees in evidence and instructed the jury as to the limited purposes for which they could be considered. Recognizing the trial court's wide discretion with respect to such matters, the Court of Appeals properly affirmed. A trial court must be accorded reasonable latitude in determining the relevancy of evidence in antitrust cases, including evidence of consent decrees, *Greyhound Computer Corp. v. IBM Corp.,* 1977 CCH Trade Cases, ¶61,603 (9th Cir. 1977); *Gray v. Shell Oil Co.,* 469 F.2d 742, 751 (9th Cir. 1972); *Control Data Corp. v. IBM Corp.,* 421 F.2d 323, 326 (8th Cir. 1970). Given the context in which those consent decrees were admitted and the trial court's carefully limiting instructions with respect thereto, the Court of Appeals was plainly correct in concluding "There was no abuse of discretion here" (555 F.2d at 697).

Petitioners rely upon 15 U.S.C. §16(a), which provides that government antitrust judgments constitute prima facie evidence of a violation of the antitrust laws. In contending that §16(a) does not apply to consent decrees, however, petitioners argue a different case. Mt. Hood did not offer the consent decrees as prima facie evidence under §16(a), and the trial court's instructions plainly forbade such use (Tr. 1407-08, 6744-47). But §16(a) certainly does not preclude admission of consent decrees for

all purposes. This Court declared in *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558 (1951), in limiting the prima facie effect of a judgment under §16(a), "we do not intend to preclude its admission for such other purposes, apart from [§16(a)], as the general law of evidence may permit" (p. 572, n.8). As held in *Vitagraph, Inc. v. Perelman*, 95 F.2d 142, 146 (3d Cir. 1938), *cert. denied*, 305 U.S. 610 (1938):

> "The testimony as to the consent decree was not admitted as, or intended to be, prima facie evidence against the defendant in this case, but was simply admitted as fact showing the activity of the defendants to prevent double featuring, and as such the testimony was admissible." (95 F.2d at 146)

Both decrees were plainly relevant here. Evidence that petitioners entered consent decrees with no intention of adhering to them, or with the intention of achieving the same restraints by more devious means, is probative of Greyhound's predatory intent.[14] Even conduct which is constitutionally exempt from the antitrust laws may nonetheless be relevant "to show the 'purpose and character of the transaction under scrutiny'." *United Mine Workers v. Pennington*, 381 U.S. 657,

[14]Immediately after the 1947 decree required petitioners to discontinue their restrictive traffic arrangements with other carriers, petitioners sought ICC approval of their acquisitions of those same carriers by fraudulent denials of their predatory conduct toward Mt. Hood. Immediately following entry of the 1957 consent decree which prohibited petitioners from coercing independent joint agencies to discriminate against other carriers, petitioners instructed certain joint agencies to continue their discriminatory practices against Mt. Hood despite the decree but gave such instructions "verbally" to avoid disclosure. (Exhs. 290, 292).

671, n.3 (1965); *Household Goods Carriers Bureau v. Terell*, 452 F.2d 152, 158 (5th Cir. 1971). The decrees were also relevant to show that Mt. Hood, in the exercise of ordinary diligence, relied upon them and would not have reason to know of petitioners' fraudulent concealment of their violations.[15] The trial court admitted the decrees for those limited purposes and no other (Tr. 6746-47). The Court of Appeals correctly affirmed.

IV. BOTH COURTS BELOW CORRECTLY RULED WITH RESPECT TO PETITIONERS' FRAUDULENT CONCEALMENT

The jury specifically found on substantial evidence that Mt. Hood did not have knowledge or notice of petitioners' antitrust violations until December 14, 1960 (App. A). Both the trial court and the Court of Appeals thoroughly reviewed that evidence and both upheld the jury's verdict. Petitioners would now have this Court grant certiorari (a) to consider whether the equitable doctrine of fraudulent concealment applies to antitrust cases and (b) assuming it does, to give the record still another review to determine if the unanimous conclusion of the jury and the District Court and the Court of Appeals was supported by the evidence.

Whether the doctrine of fraudulent concealment applies to antitrust cases is not a question warranting further

[15]Both decrees were promptly communicated to Mt. Hood by petitioners and Mt. Hood justifiably relied upon them as solemn commitments that petitioners would not engage in the conduct recited therein (Tr. 3654). Mt. Hood's president testified: "I felt that this was a court order and they were enjoined from doing these practices" (Tr. 3654).

comment by this Court. The Court declared in *Holmberg v. Armbrecht*, 327 U.S. 392 (1946): "This equitable doctrine is read into every federal statute of limitations". Relying upon *Holmberg*, the Court declared in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 559 (1974), an antitrust case, that "in cases where the plaintiff has refrained from commencing suit during the period of limitation . . . because of fraudulent concealment [citation], this Court has not hesitated to find the statutory period tolled or suspended by the conduct of defendant." Of the nine circuits that have considered the question, all declared the doctrine of fraudulent concealment applies to antitrust cases.[16]

Nor should this Court have to review the evidence again. The record established to the jury's satisfaction that petitioner's continuous stream of false assurances to the ICC and Mt. Hood, generally under oath and invariably to procure valuable rights from the ICC and forbearance by Mt. Hood, had such a profound cumulative impact as to preclude any reasonably diligent person from possessing knowledge of petitioners' covert practices. Petitioners intended both Mt. Hood and the ICC to rely

[16] *Atlantic City Electric Co. v. General Electric Co.*, 312 F.2d 236 (2d Cir. 1962), *cert. denied*, 373 U.S. 909 (1963); *Weinberger v. Retail Credit Co.*, 498 F.2d 552 (4th Cir. 1974); *General Electric Co. v. City of San Antonio*, 334 F.2d 480 (5th Cir. 1964); *Akron Presform Mold Co. v. McNeil Corp.*, 496 F.2d 230 (6th Cir. 1974); *Allis Chalmers Mfg. Co. v. Commonwealth Edison Co.*, 315 F.2d 558 (7th Cir. 1963); *Kansas City, Mo. v. Federal Pac. Elec. Co.*, 310 F.2d 271 (8th Cir. 1962), *cert. denied*, 373 U.S. 914 (1963); *Westinghouse v. Pac. Gas & Elec. Co.*, 326 F.2d 575 (9th Cir. 1964); *Public Service Co. of New Mexico v. General Electric Co.*, 312 F.2d 306 (10th Cir. 1963), *cert. denied*, 374 U.S. 809 (1963); *Westinghouse Electric Corp. v. City of Burlington, Vermont*, 326 F.2d 691 (D.C. Cir. 1964).

upon those assurances as true (555 F.2d at 689) and Mt. Hood did not have knowledge of any facts to indicate they were false (Tr. 3460-3791). The ICC also relied upon petitioners' representations (555 F.2d at 689) and subsequently declared they were a "commitment" not to engage in destructive competitive practices against Mt. Hood and that Mt. Hood "withdrew its opposition in reliance upon such statements" (104 MCC at pp. 462-463).[17]

After petitioners' acquisition program closed in the 1950s, Mt. Hood expressed concern about the failure of a few of petitioners' independent commission agents to quote Mt. Hood service. But petitioners have always maintained they "have no control over the [commission agents'] action and the routing by such commission agents is not a routing by defendants" (Tr. 5676; see also Tr. 267-269; 370; 1496; 3779). Hence Mt. Hood could only suspect that petitioners were lax in their failure to instruct those agents to quote Mt. Hood service (Exh. 197). But laxity is not fraud or collusion and mere suspicion does not constitute knowledge of an antitrust violation. *Friedman v. Meyers*, 482 F.2d 435, 439 (2d Cir. 1973). The court below found that petitioners violated the Sherman Act by collusive and fraudulent behavior aimed at destroying Mt. Hood. Mt. Hood had no knowledge of *that*,

[17] In rejecting petitioners' claim that the ICC had no business relying upon their representations, the District Court in Chicago declared the ICC "had a duty to do so" (308 F.Supp. at 1039). Clearly Mt. Hood was at least equally entitled to rely upon petitioners' sworn representations, *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238, 246 (1943); *International Ladies Garment Workers v. NLRB* 463 F.2d 907, at 922-23 (D.C. Cir. 1973).

and Greyhound's false denials could not give Mt. Hood such knowledge.[18]

When a plaintiff first knew or should have known of a fraudulently concealed antitrust violation is a question of fact for the jury. This jury decided that question against petitioners on substantial evidence, and the trial court upheld that verdict declaring "I am satisfied that there is plenty of evidence to support that verdict on that point." (Tr. 6801) The Court of Appeals reviewed the same voluminous record and unanimously affirmed the trial court. That should be enough. "A seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error." *Comstock v. Group of Institutional Investors,* 335 U.S. 211, 214 (1947).

V. BOTH COURTS BELOW CORRECTLY HELD THE STATUTE OF LIMITATIONS WAS TOLLED BY THE ICC PROCEEDINGS TO ENJOIN PETITIONERS' DESTRUCTIVE PRACTICES

Promptly after petitioners broke connections with Mt. Hood in July 1964, Mt. Hood petitioned the ICC for an order "which will have the effect of prohibiting the discriminatory, and destructive competitive practices herein described" (R. 1407-1408). Just over 60 days later—on

[18]Petitioners contend that once a plaintiff is on notice, he can no longer rely upon a defendant's false denials. But as the Court of Appeals observed, that begs the very question which the jury decided against petitioners on substantial evidence. "In the present case the jury weighed the evidence and concluded that, in part because of Greyhound's attempts at concealment, Mt. Hood neither knew nor should have known of Greyhound's antitrust violation" (555 F.2d at 698).

December 14, 1964—the Justice Department (Antitrust Division) intervened in Mt. Hood's support and vigorously prosecuted that action for the next ten years in a continuous effort to stop petitioners from trying to destroy Mt. Hood.

The Court of Appeals upheld the trial court's ruling that the statute of limitations was tolled from December 14, 1964 thereafter, during the pendency of the Government's action to enjoin Greyhound's predatory conduct toward Mt. Hood, by reason of the Clayton Act, 15 U.S.C. §16(i). That decision was plainly correct. It accords with 15 U.S.C. §16(i) and the Congressional policy behind it and is supported by this Court's uniform construction of §16(i) to accommodate private antitrust enforcement policy. *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.,* 381 U.S. 311 (1965); *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 401 U.S. 321 (1971); *Leh v. General Petroleum Corp.,* 382 U.S. 54 (1965).

First, the courts below were correct in holding that on December 14, 1964, a "civil proceeding" was "instituted by the United States" within the purview of §16(i).[19] Seizing upon the happenstance that Mt. Hood sought relief just over 60 days before the Justice Department

[19]Defendants contend the Government action was not instituted on the date of its petition for leave to intervene but, at the earliest, on the date said petition was granted. Defendants cite no authority. "In determining whether an intervenor has asserted his claim within the period of the applicable statute of limitations, it has been held that the relevant date is the filing of the motion accompanied by the proposed complaint rather than the day on which the complaint itself is filed after the court has granted the motion." Wright & Miller, *Federal Practice & Procedure,* Vol. 7a, §1914.

did, petitioners claim that a Government action was thus not "instituted." But that is the kind of "grudging interpretation" which this Court, the courts below and several other federal courts have disapproved as contrary to "Congress' basic policy objectives" (555 F.2d at 700).[20] From the date the Government instituted its action 14 years ago until now, it has vigorously prosecuted it for the protection of a small competitor threatened with destruction. When petitioners appealed the ICC's order to the courts eight years ago, it was the Government (not Mt. Hood) that petitioners sued, it was the Government (not Mt. Hood) that counterclaimed for injunctive relief and it was the Government (not Mt. Hood) that later brought contempt proceedings against petitioners for their wilful violations. It would exalt form over substance to say the Government did not "institute" proceedings against petitioners merely because it elected to assert its claim in a pending ICC case.

Both courts below also properly held, on the basis of substantial evidence, that the Government's action was brought "to prevent, restrain or punish violations . . . of the antitrust laws" within the purview of §16(i). In light of the Government's active role in seeking injunctive re-

[20]In holding that "The literal wording of section 16(i) is not controlling" where "one possible interpretation of the language would effect the congressional purpose and another defeat it" (555 F.2d at 699), the court below was in accord with the following Supreme Court and Court of Appeals decisions: *Minnesota Mining, Zenith* and *Leh* [*supra*]; *Luria Steel & Trading Corp. v. Ogden Corp.*, 484 F.2d 1016 (3d Cir.), *cert. denied*, 414 U.S. 1158 (1974); *Rader v. Balfour*, 440 F.2d 469 (7th Cir.), *cert. denied*, 404 U.S. 983 (1971); *Hardy Salt Co. v. Illinois*, 377 F.2d 768 (8th Cir.), *cert. denied*, 389 U.S. 912 (1967); *Kansas City, Mo. v. Federal Pac. Elec. Co.*, 310 F.2d 271 (8th Cir.), *cert. denied*, 373 U.S. 914 (1963).

lief for the protection of Mt. Hood against petitioners' destructive practices, petitioners' threshold claim that the Government "took no position" in the ICC case is frivolous. Petitioners further claim that assuming the Government did take a "position", it was not to prevent conduct which violates the antitrust laws.[21] The Court of Appeals properly rejected that claim also, because an agency proceeding not brought "under" the antitrust laws may nonetheless be to "prevent" antitrust violations for §16(i) purposes (555 F.2d at 700). The question is whether the proceeding "is directed at alleged conduct which appears to involve an existing or incipient violation of the antitrust laws", *Rader v. Balfour,* 440 F.2d 469, 473 (7th Cir., (1971); *Luria Steel & Trading Corp v. Ogden Corp.*, 484 F.2d 1016, 1020-21 (3d Cir. 1973).

Clearly the ICC action was just that. The court below declared "it is evident that the conduct underlying the regulatory proceedings and that underlying the antitrust suit are essentially the same" (555 F.2d at 691). Petitioners will not dispute this.[22] The Justice Department's petition for leave to intervene plainly declared its purpose was to prevent antitrust violations (R. 2272). The ICC similarly declared it was enjoining conduct which it considered a violation of the antitrust laws (104 MCC at 451-63). The District Court in Chicago, finding that the petitioners engaged in "destructive competition", rec-

[21]In making that claim, petitioners forget they told the court below that "the Justice Department intervened in the [ICC] proceeding to assure the adequate consideration of antitrust issues" (555 F.2d at 701).

[22]They told the court below that "in its petition [before the ICC], plaintiff alleged substantially everything which is alleged in its complaint in this Court" (R. 94).

ognized the ICC's duty to enjoin conduct found to be in violation of the antitrust laws (308 F.Supp. at 1032, 1038). In granting a permanent injunction against petitioners' "destructive practices", the District Court was acting in accordance with numerous Supreme Court decisions which hold the ICC has a duty to consider the antitrust laws.[23] Referring to 15 U.S.C. §26, which allows only the Justice Department to obtain injunctions against antitrust violations by ICC-regulated carriers, the Court in *Denver* stated "this provision underscores the ICC's responsibility to act when such [antitrust] violations are brought to its attention" (387 U.S. at 502).

In holding that §16(i)'s "clearly expressed purpose" is "to further effective enforcement of the antitrust laws by permitting private litigants to have the benefits that may flow from governmental antitrust enforcement efforts" (555 F.2d at 699), the court below was faithful to this Court's pronouncements in *Minnesota Mining, Zenith* and *Leh.*[24] Petitioners assert "the only benefit Mt. Hood derived" from the Government action "is the tolling of the statute itself." Although Mt. Hood does not have to prove

[23]*See, e.g., Denver & R.G.W.R. Co. v. United States,* 387 U.S. 485 (1967); *McLean Trucking Co. v. United States,* 321 U.S. 67 (1944); *United States v. Interstate Commerce Commission,* 396 U.S. 491 (1970); *Gulf State Utilities Co. v. FPC,* 411 U.S. 747, (1973).

[24]The Court in *Minnesota Mining* referred to "the one element of congressional intention which is plain on the record—the clearly expressed desire that private parties be permitted the benefits of prior Government actions" (p. 320). In *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 401 U.S. 321 (1971), this Court held that a broad construction of §16(i) "materially furthers congressional policy by permitting private litigants to await the outcome of Government suits and use the benefits accruing therefrom" (p. 336).

benefits for tolling to apply (555 F.2d at 699 n.31), benefits were conferred by the Government's action which the court below recognized. Important among them were (1) the permanent injunction which the Government obtained for Mt. Hood and (2) the successful resolution of several issues, which the court below recognized as "critical to the defeat of Greyhound's claim of immunity" (555 F.2d at 699). These were benefits no less important to Mt. Hood merely because Mt. Hood assisted the Government in achieving them.

Finally, petitioners' "floodgates" argument must also fail. Both courts below merely held that when a Government action is initiated in a pending ICC case to seek injunctive relief against antitrust violations, §16(i) tolls the statute. Petitioners now ask this Court to decide whether the statute might also be tolled whenever the Justice Department informally "participates" in various other regulatory proceedings "to express its views". But that is not the question which the court below decided or a question which this case presents. Petitioners advert to the spectre of "countless stale antitrust claims" which they speculate might be revived by the lower court's decision, but that spectre pales in the light of Congressional policy which favors private antitrust enforcement and which the Court of Appeals' construction of §16(i) served.[25]

Even if the Government had not begun its action on December 14, 1964, to enjoin petitioners' destructive com-

[25]As declared in *Westinghouse v. Pac. Gas & Elec. Co.,* 326 F.2d 575 (9th Cir. 1964), "Congress was as concerned with the effective enforcement of the Clayton Act as with the banning of stale claims when it enacted Sections 4B and 5(b)" (326 F.2d at 580).

petition so as to invoke §16(i), as it did, the statute of limitations was nonetheless suspended when Mt. Hood filed its petition with the ICC on October 7, 1964. Although the statute of limitations reflects a legislative policy of repose, *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342 (1944), this policy is "frequently outweighed . . . where the interests of justice require vindication of the plaintiff's rights" *Burnett v. New York Cent. R.R.*, 380 U.S. 424, 428 (1965). As a result, the federal doctrine of equitable tolling has developed, is well established, and plainly applies here.

Burnett stands for the principle that a federal statute of limitations should be tolled "whenever Congressional purpose is effectuated by tolling the statute of limitations in given circumstances" (380 U.S. at 426-27). In *Burnett*, a state court action was dismissed for improper venue and plaintiff thereafter brought suit in the federal court. This Court held the state action tolled the statute of limitations because plaintiff was diligent, defendant was given adequate notice and tolling would effectuate important federal policies. The Supreme Court in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), followed *Burnett* in holding that an improper class action tolled the statute of limitations as to all purported class members. "The proper test," declared the Court, "is whether tolling the limitation in a given context is consonant with the legislative scheme" (414 U.S. at 557-558).

Policy considerations were obviously important in *Burnett* and *American Pipe*, and two important policies have been served by tolling the statute of limitations here:

(a) that which favors private enforcement of the federal antitrust laws (*Minnesota Mining* [*supra*, 381 U.S. at 317-18]; *Zenith Radio Corp.* [*supra*, 401 U.S. at 336]) and (b) that which favors preliminary resort to the regulatory agency having primary jurisdiction of the matters alleged to obtain rulings that would be of material aid to the federal courts in deciding questions of antitrust immunity, *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289 (1973); *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966).

Policy considerations are even stronger here than in *Burnett, American Pipe, Minnesota Mining, Zenith* and *Leh*. In those cases, the statute was tolled for the benefit of plaintiffs who either had committed some procedural error, such as filing in the wrong court (*Burnett*) or filing an improper class action (*American Pipe*), or who were passively awaiting the outcome of related government litigation (*Zenith* and *Leh*). In contrast, Mt. Hood properly and necessarily resorted to the only forum available to it for injunctive relief and for a resolution of important threshold questions so as to enable the federal court to resolve petitioners' claim of immunity without risk of conflict between the regulatory and antitrust schemes. The court below observed this was "critical to the defeat of Greyhound's claim of antitrust immunity" (555 F.2d at 699).

Finally, the statute of limitations' policy has been fully satisfied here. Mt. Hood has neither slumbered on its rights nor surprised petitioners with stale claims. Indeed, petitioners have tenaciously fought Mt. Hood's claims for the past fourteen years. In holding the statute of limi-

tations was tolled during the pendency of related agency proceedings, this Court declared in *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, "Regrettable as the long delay has been it has been caused by the exigencies of the contest, not by the neglect to proceed" (321 U.S. at 349). Mt. Hood acted in accordance with the federal doctrine of primary jurisdiction. Having thus invoked the "remedial scheme developed for enforcement of rights" *United States v. Western P.R. Co.*, 352 U.S. 54, 64 (1956), it should in fairness not be faced with the limitations bar as a result.

CONCLUSION

For the foregoing reasons the Petition herein should be denied and this litigation should end.

November 23, 1977.

Respectfully submitted,

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(Appendices Follow)

APPENDICES

Appendix A—Special Verdict

United States District Court
District of Oregon

Civil No. 68-374

Mt. Hood Stages, Inc., doing business as Pacific Trailways,
Plaintiff,
vs.
The Greyhound Corporation and Greyhound Lines, Inc.,
Defendants.

[Filed May 2, 1973]

SPECIAL VERDICT

We, the jury, answer the interrogatories as follows:

1. Do you find from the evidence that defendants or either of them violated Section 1 of the Sherman Act?

V
YES ____ NO

2. Do you find from the evidence that defendants or either of them violated Section 2 of the Sherman Act?

V
YES ____ NO

If the answers to Nos. 1 and 2 are *both* "no", you need not answer any further questions.

3. If the answer to Nos. 1 or 2 is "yes", do you find that such violations were fraudulently concealed by defendants, from plaintiff:

(a) during the period January 1, 1953, to December 14, 1960?

YES	NO
V	

(b) during the period December 15, 1960 to July 4, 1964?

YES	NO
V	

4. If the answer to No. 3 (a) or (b) is "yes", please state the date prior to July 5, 1964, which, under the instructions I have given you, you find was the time plaintiff knew or should have known of this violation:

Dec. 14, 1960 (Date)

5. If the answer to Nos. 1 or 2 is "yes", do you find that plaintiff was injured by such violations of the anti-trust laws?

YES	NO
V	

6. If you answer question 5 "yes", then fill in for each of the following periods the amount of damages if any sustained in that period:

July 5, 1964, to March 25, 1973	Amount	$2,650,491
December 15, 1960 to July 5, 1964	Amount	$ 626,482
January 1, 1953, to December 15, 1960	Amount	$1,105,057

Dated this 2nd day of May, 1973.

/s/ Nora Q. Pirrie
Foreman of the Jury

Appendix B—Statutes Involved

Section 1 of the Sherman Act:

§ 1. *Trusts, etc., in restraint of trade illegal; penalty*

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.
As amended Dec. 21, 1974, Pub.L. 93–528, § 3, 88 Stat. 1708; Dec. 12, 1975, Pub.L. 94–145, § 2, 89 Stat. 801.

Section 2 of the Sherman Act:

§ 2. *Monopolizing trade a felony; penalty*

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.
As amended Dec. 21, 1974, Pub.L. 93–528, § 3, 88 Stat. 1708.

The National Transportation Policy:

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act (chapters 1, 8, 12, 13, and 19 of this title), so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act (chapters 1, 8, 12, 13, and 19 of this title) shall be administered and enforced with a view to carrying out the above declaration of policy."

(Act of September 18, 1940, c. 722, Title I, § 1, 54 Stat. 899; 49 U.S.C. preceding § 1).

Supreme Court, U. S.
FILED
DEC 6 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-598

THE GREYHOUND CORPORATION AND GREYHOUND LINES, INC.,
Petitioners,

vs.

MT. HOOD STAGES, INC.,
doing business as PACIFIC TRAILWAYS,
Respondent.

Reply Brief in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-598

THE GREYHOUND CORPORATION AND GREYHOUND LINES, INC.,
Petitioners,

vs.

MT. HOOD STAGES, INC.,
doing business as PACIFIC TRAILWAYS,
Respondent.

Reply Brief in Support of Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

INTRODUCTION

Respondent's brief in opposition is devoted principally to reviling Greyhound. Obviously Respondent seeks to persuade this Court that Petitioners are evil and deserve what they got so that this Court should ignore the questions of law and policy presented and the improper means by which the result below was reached. While that formula has been successful until now,[1] all Respond-

1. The Court of Appeals, for example, relied heavily on the fact that the ICC had disapproved Petitioners' conduct (*e.g.*, Petition, App. A, pp. 9-11). Both lower courts seemed unconcerned about the obviously prejudicial effect of having the jury told that Petitioners entered into consent decrees prohibiting violation of the antitrust laws (Exs. 62, 265); that the ICC had disapproved Petitioners' conduct in issue (see Petition, p. 18, n.17); and that the United States had charged Petitioners with criminal contempt with respect to that conduct. (Tr. 1359-1363, 3268-3271, 3750-3755, 6322-6327, 6325-6652)

ent's vilification cannot obscure the truth, acknowledged by both courts below, that "this case is, in many ways, unusual, and that its complexity and difficulty set it apart from the common run of antitrust cases, if such a category in fact exists." (Petition, App. D, p. 38; App. A, pp. 29-30) For all its righteous zeal Respondent cannot deny that this case presents novel legal issues and important questions of policy that this Court should decide.

REPLY TO RESPONDENT'S REASONS FOR DENYING THE WRIT

I. Certiorari Should Be Granted to Correct the Court of Appeals' Serious Errors of Law in Refusing to Hold the Antitrust Laws Preempted.

A. THE JURY'S FINDING OF A VIOLATION OF SECTION 1 IS NO REASON TO DENY THE WRIT.

Respondent begins by accusing Petitioners of having "grossly misstated" the record, resulting in "an incredible distortion". That is said to have occurred because Petitioners described this as a "monopolization case" which was "essentially based on the approved acquisitions". (Resp. Br., p. 11) But that description is not Petitioners'; it is the Court of Appeals':

> "The *essence* of Mt. Hood's antitrust claim is that Greyhound acquired bus companies whose routes circled those of Mt. Hood and thereafter deprived Mt. Hood of connecting or 'bridge' traffic with the purpose and effect of eliminating Mt. Hood as a substantial competitor." (Petition, App. A, p. 2)[2]
>
> "[Mt. Hood's] complaint alleged that . . . Greyhound had *restrained and monopolized commerce* . . . by means essentially the same as those that were the subject of the Commission's proceeding; that is, *the acquisition of independent bus lines with Commission consent . . . and thereafter engaging in the destructive competitive tactics* found by the Commission." (*Id.*, p. 5)

2. All emphasis is added unless otherwise stated.

That the approved and immunized transactions were central to Respondent's success before the jury cannot be doubted. (Petition, p. 20) Indeed, Respondent itself told the jury that "fundamentally" what it "charged Greyhound with here is monopolization." (Tr. 6174; *see* Tr. 6204, 6170-72) It is too late now for Respondent to try to change its theory.[3]

When stripped of its emotive language, Respondent's argument is simply this: There can be no preemption of the antitrust laws here because the jury found a violation of Section 1 of the Sherman Act. The idea apparently is that an agency's exclusive jurisdiction may preempt Section 2, but not Section 1 of the Sherman Act. (Resp. Br., pp. 12-13) That novel idea, however, is without any support and is repudiated by previous decisions of this Court which explicitly hold that exclusive agency jurisdiction preempts both Section 1 and Section 2 of the Sherman Act. *United States v. National Association of Securities Dealers*, 422 U.S. 694, 697, 730 (1975); *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 661 (1975).[4] Far from being an "independent basis" for denying

3. Respondent states that the jury was told that improper use of monopoly power was required for a violation (Resp. Br., pp. 11-12), but ignores the indisputable fact that the jury was also erroneously instructed that such improper use could be shown from "wholly innocent or lawful acts". (Tr. 6759) Thus, admittedly immunized and lawful acquisitions coupled with "wholly innocent or lawful acts" become a violation of the Sherman Act. How can that be? Respondent does not answer that question and does not state why it is undeserving of this Court's attention. *See* Petition, p. 20.

4. Even Respondent's cases do not support its position. *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363 (1973), was also a Section 1 conspiracy case. *See, e.g., Trans World Airlines, Inc. v. Hughes*, 214 F.Supp. 106, 108 (S.D.N.Y. 1963); 409 U.S. at 388. *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439 (1945), merely held that the particular conspiracy there involved was subject to the antitrust laws because the ICC had no power to regulate it. That the decision is so limited is made explicit by the third case on which Respondent relies, *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 306, n.11 (1963).

the Petition (Resp. Br., p. 13), Respondent's argument urges this Court to adopt a new and unprecedented rule of antitrust law, and thus in effect it presents yet one more reason for this Court to grant certiorari.

B. REVIEW BY THIS COURT IS NEEDED TO GIVE PROPER SCOPE TO THE ICC'S EXCLUSIVE JURISDICTION.

Contrary to Respondent's statement, Petitioners' request that this Court review the judgment below is not based solely on the fact that it is a pervasively regulated common carrier. (Resp. Br., p. 13)[5] Petitioners assert that review is critically needed because Congress intended the ICC to have exclusive jurisdiction to control the conduct here involved, and the decision below fails to give effect to that intention. (Petition, pp. 8-19)

First, Section 5(12) of the Interstate Commerce Act expressly declares the ICC's jurisdiction to be "exclusive and plenary". 49 U.S.C. § 5(12). (Petition, pp. 9-10) The Court of Appeals ignored that language. Now Respondent ignores it too. Action by this Court is needed to give that statutory mandate its proper effect.

Second, Congress expressly authorized the ICC to approve and immunize acquisitions, including anticompetitive acquisitions, and expressly empowered the ICC to control and regulate subsequent conduct, including anticompetitive conduct. 49 U.S.C. §§ 5(2), 5(10); *see also* 49 U.S.C. § 316. Congress also expected and intended that in exercising that authority the ICC would apply standards inconsistent with the antitrust laws. *McLean*

5. Pervasive regulation without more may provide antitrust immunity, and this case could present an opportunity for this Court to so determine, for it is indisputable that Petitioners' conduct was and is subject to pervasive ICC regulation. Respondent's argument that pervasive regulation does not provide antitrust immunity is at odds with statements in the opinions of this Court which have declined to find antitrust immunity because the industry there involved was *not* pervasively regulated. *See, e.g., Otter Tail Power Co. v. United States,* 410 U.S. 366, 373-74 (1973); *United States v. Radio Corp. of America,* 358 U.S. 334, 348-49 (1959).

Trucking Co. v. United States, 321 U.S. 67, 79-88 (1944); Petition, pp. 12-13, 19-20. Therefore, the ICC's jurisdiction at issue is exclusive and preempts the antitrust laws, quite apart from the express language of Section 5(12). (Petition, pp. 9-19)

Respondent asserts that implied immunity is not appropriate here because the ICC did not "approve" Greyhound's conduct. (Resp. Br., pp. 17-21) While the Court of Appeals accepted that rationale (Petition, App. A, p. 11), this Court has rejected it. (Petition, pp. 13-19)[6] Similarly, Respondent's (and the Court of Appeals') contention that immunity applies only if the precise conduct challenged by the antitrust complaint is necessary to make the regulatory scheme work (Resp. Br., pp. 18-21) misunderstands this Court's prior decisions, one of which has expressly rejected that reasoning.[7] Immunity is not implied because specific private conduct is necessary to the regulatory scheme, but because effective implementation of the regulatory scheme requires that the agency's *jurisdiction to regulate* that conduct be exclusive. Applying antitrust standards to conduct regulated by the ICC under Section 5 prevents the ICC from regulating conduct pursuant to the National Transportation Policy and inter-

6. *Hughes Tool Co. v. Trans World Airlines, Inc.,* 409 U.S. 363 (1973), did not involve conduct which had been approved by the CAB. Petition, pp. 13-15. *See also* 409 U.S. at 376-77. *Pan American World Airways, Inc. v. United States,* 371 U.S. 296 (1963), involved disapproved conduct. (Petition, pp. 15-16) So did *Gordon v. New York Stock Exchange, Inc.,* 422 U.S. 659 (1975) (SEC adopted rule prohibiting exchanges from using or requiring members to use fixed commission rates with respect to nonmember rates. 422 U.S. at 675; *see also* 422 U.S. at 673-74). Respondent's quotation from *NASD* (Resp. Br., p. 18) is out of context; the SEC in fact had disapproved the challenged practices and had required corrective measures. *See* 422 U.S. at 733-34.

7. *Gordon v. New York Stock Exchange, Inc.,* 422 U.S. 659 (1975): "To the extent that the Court of Appeals in [*Thill Securities Corp. v. New York Stock Exchange,* 433 F.2d 264 (7th Cir. 1970), *cert. denied,* 401 U.S. 994 (1971)] viewed the question of implied repeal as a question of fact, concerning whether the particular rule [conduct] itself is necessary to make the Act work, we decline to follow that lead." 422 U.S. at 687; *see* Petition, p. 17 & n.15.

feres with its ability to determine the type, extent and timing of any needed remedies regardless of whether it has approved or disapproved the conduct involved. Moreover, the Petition explained how this case causes precisely these problems and how it has produced a specific conflict between antitrust and public interest standards. (Petition, pp. 16-19 & n.16) Respondent chooses to ignore these points; they remain valid and unanswered.

The fact that Respondent has misunderstood the principles embodied in this Court's prior decisions is unimportant. The fact that the Court of Appeals has similarly misunderstood them, however, is important. The Court of Appeals' misunderstanding has resulted in the erroneous imposition of a $14,400,000 judgment against Greyhound and in the promulgation of new and unsound principles which seriously undermine the ICC's ability to perform its statutory duties. (Petition, pp. 17-19)

C. REVIEW BY THIS COURT IS NEEDED TO GIVE EFFECT TO THE EXPRESS IMMUNITY PROVISIONS OF SECTION 5(12) OF THE INTERSTATE COMMERCE ACT.

Respondent admits that under Section 5(12) of the Interstate Commerce Act the "acquisitions remain immune from antitrust sanctions" (Resp. Br., p. 16), and it does not claim that the jury was told of the immunity. Therefore, Respondent effectively admits Petitioners' contention that the decision below is contrary to the express statutory immunity provided by Section 5(12). That alone is good ground for this Court to grant the Petition.

Instead of addressing Petitioners' arguments with respect to Section 5(12), Respondent chooses to attack a strawman of its own creation. Petitioners do not contend that Section 5(12) "immunize[s] every conceivable use of the acquired properties, no matter how collusive or predatory." (Resp. Br., p. 15) What Petitioners do contend is that ICC disapproval of *some* conduct does not mean that *everything* Petitioners did was not "necessary" within the meaning of Section 5(12). And it does not mean that

the acquisitions themselves, which no one contends were "disapproved", have somehow retroactively lost their statutory immunity. (Petition, p. 21) Yet the decision below creates precisely those illogical results. By approving the District Court's refusal to exclude evidence or to instruct the jury on the plain meaning of Section 5(12), the Court of Appeals has effectively read that Section out of existence. (Petition, pp. 20-21) Review by this Court is required if Congress' words and purpose are to have any meaning.

II. The Use of the Consent Decrees Sanctioned in This Case Presents Important Issues for This Court.

The Court of Appeals' decision approved the use of the consent decrees in this case on "the issues of motive, intent and purpose of Greyhound and the reasonableness of their behavior under Section 1 and 2 of the Sherman Act." (Tr. 6747) That decision destroys the incentive for defendants to settle government cases and therefore jeopardizes the Justice Department's consent decree program. That program is of "crucial importance"; it constitutes 80 percent of the Justice Department's antitrust enforcement efforts. (Petition, pp. 24-25) Respondent's brief effectively concedes the existence of the serious questions of public policy raised by the decision below. Those questions are plainly of major importance; the Court should grant certiorari to consider them.

All Respondent's brief does is to admit that Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), does not support the Court of Appeals' decision. (Resp. Br., p. 21) But it ignores the numerous cases which hold that decrees are not admissible absent Section 5(a). (Petition, pp. 22, 25)[8]

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8. The only known case in which a consent decree has been allowed in evidence for *any* purpose is *Vitagraph, Inc. v. Perelman,* 95 F.2d 142 (3d Cir.), *cert. denied,* 305 U.S. 610 (1938), a *non-jury* case in which a decree was admitted as evidence of a fact admitted in the decree. That is a far cry from the way Greyhound's consent decrees were used to influence the jury in this case. (*See* Petition, p. 22.)

In sum, the Court of Appeals' decision is both unprecedented and important. Respondent does not claim otherwise.

III. The Statute of Limitations Questions Are Important to the Administration of the Federal Courts and Antitrust Laws.

A. THE APPLICATION OF 15 U.S.C. § 16(i) TO THIS CASE PRESENTS AN ISSUE THAT SHOULD BE DECIDED BY THIS COURT.

The requirements of Section 16(i) are clear: The statute of limitations is tolled by a civil or criminal proceeding *instituted by the United States to prevent, restrain or punish violations of the antitrust laws* with respect to *matters complained of in the United States' proceeding.*

It is perfectly plain that those requirements are not satisfied by the ICC proceedings instituted by Mt. Hood to obtain a supplemental order under Section 5(10) of the Interstate Commerce Act in which the United States later intervened but complained of nothing and sought no relief. (Petition, pp. 26-29) It is also clear that the Court of Appeals' holding that the statute nevertheless was tolled is unique. Finally, it is clear that the Court of Appeals' decision is important to the future administration of the antitrust laws because it may well compel the lower courts to find the statute tolled in all the myriad circumstances of Justice Department participation in administrative proceedings. (Petition, p. 31)

Respondent does not deny that the Court of Appeals' interpretation of Section 16(i) is unprecedented; instead, it argues the merits of that interpretation. (Resp. Br., pp. 26-31) Its argument, however, does not dispute the need for this Court to grant certiorari to resolve the dispute concerning the Court of Appeals' novel construction of Section 16(i).

Respondent also contends that the holding below is unimportant, arguing that it will not apply to the Justice Department's participation in other agency proceedings. (Resp. Br., p. 31) But the Court of Appeals' decision contains no limitations. Moreover, Respondent's contention rests on its claim that in this case the

United States in fact "instituted" the ICC proceeding and thereafter "vigorously prosecuted" it. (Resp. Br., pp. 27-30) That claim is false. Respondent, not the United States, was the party seeking relief in the ICC proceedings, and the relief it sought was a modification of the prior ICC orders approving the acquisitions. The government's petition for leave to interevene did not charge Greyhound with any wrongdoing and, contrary to Respondent's statements (Resp. Br., pp. 27-28, 31), it did not ask for any relief. (Petition, pp. 27-29)

Respondent cites nothing to support a contrary conclusion. Its reference in this connection to the review proceedings before the three-judge court in Chicago *after* the ICC decision (Resp. Br., p. 28) is particularly misleading. The government was a party there only because the statute authorizing review of ICC orders required that review be sought by filing a complaint against the United States. 28 U.S.C. § 2322. And the fact that the Department of Justice performed its statutory duty to represent the ICC in proceedings to enforce an ICC decision, 28 U.S.C. § 2323, hardly shows that it "instituted" or "prosecuted" the ICC proceeding that resulted in the decision.[9]

More important, Respondent's arguments confirm that the decision below announces and depends upon a new and unwise rule of law. It announces a "functional equivalent" test (Petition, App. A, p. 24), thus making the applicability of Section 16(i) turn on what position the government in fact took in the administrative proceeding. Such an uncertain and confusing rule is both unnecessary and unsound. *Cf., Leh v. General Petroleum Corp.,* 382 U.S. 54, 65 (1965). Moreover that rule was not applied in this case, because there was no review of the administrative record to determine what the government did, said or contended.

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9. The review and enforcement proceedings no more establish that the United States instituted a proceeding against Greyhound than does a mandamus proceeding against a judge establish that the judge filed a complaint against the petitioner.

Finally, Respondent asserts an entirely new basis for finding the statute tolled. It argues that the statute of limitations should be suspended during its prosecution of the ICC proceedings by a doctrine of "equitable tolling" which it says would serve the policies of both the statute of limitations and the doctrine of primary jurisdiction. (Resp. Br., pp. 32-34) Although the Court of Appeals expressly declined to address this issue (Petition, App. A, p. 23, n.34), and although the theory seems plainly unsound, it is clear that adoption of such a novel and important doctrine would require that the Court grant certiorari to afford the matter full consideration.

B. THE FRAUDULENT CONCEALMENT ISSUE IS IMPORTANT TO PRIVATE ANTITRUST LITIGATION.

This Court has never considered whether or under what circumstances the four-year statute of limitations prescribed by 15 U.S.C. § 15b may be suspended by fraudulent concealment. Those are the questions this case presents, and Respondent's misstatement of the problem cannot change it. Greyhound does not ask this Court "to review the evidence again." (Resp. Br., p. 24) To the contrary, Greyhound asks this Court to address the serious question of law raised by the facts acknowledged by the Court of Appeals. (Petition, pp. 32-35)

The facts acknowledged by the Court of Appeals are that Mt. Hood had knowledge of and formally complained about the very practices it complained of in this action and that it suspected Greyhound of unlawful conduct. (Petition, p. 32) The question is whether the Court of Appeals properly held that that knowledge and suspicion were somehow erased and the known acts "concealed" because Greyhound denied them. That is the issue for this Court, if not in this case, then soon, because antitrust plaintiffs will not be slow to claim the bonanza the Court of Appeals' decision promises.

CONCLUSION

This is a hard case and it has made bad law. This Court will have to deal with that bad law, and the sooner it does the better. A writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-598

THE GREYHOUND CORPORATION AND GREYHOUND LINES, INC.,
Petitioners,

vs.

MT. HOOD STAGES, INC.,
doing business as PACIFIC TRAILWAYS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioners' Brief on the Merits

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In the Supreme Court of the United States

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THE GREYHOUND CORPORATION AND GREYHOUND LINES, INC.,
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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioners' Brief on the Merits

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 555 F.2d 687, and reproduced at page 108 of the Joint Appendix. The Court of Appeals' order denying Greyhound's Petition for Rehearing with Suggestion for Rehearing en Banc is unreported; a copy is reproduced at page 141 of the Joint Appendix.

There is no reported decision of the District Court. Copies of its memoranda and orders denying Greyhound's post-trial motions and concerning attorneys' fees are reproduced in the Joint Appendix at pages 87 and 104, respectively.

JURISDICTION

The Court of Appeals' judgment was entered on June 9, 1977. A timely Petition for Rehearing with Suggestion for Rehearing en Banc was denied on August 3, 1977. The petition for certiorari was filed on October 25, 1977, and was granted on January 9, 1978, limited to Question 3 presented by the petition. This Court has jurisdiction to review the judgment in question under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved are Sections 4B and 5(i) (formerly Section 5(b)) of the Clayton Act, 15 U.S.C. §§ 15b and 16(i). They are set out verbatim in Appendix A, and pertinent portions of Section 16(i) are quoted in connection with the question presented.

QUESTION PRESENTED

Certiorari was granted as to Question 3 of the petition. That question asks whether the statute of limitations was tolled in this action by reason of 15 U.S.C. § 16(i), which provides that:

> "Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws . . . the running of the statute of limitations in respect of every private . . . right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended . . . ." 15 U.S.C. § 16(i)

Did the Court of Appeals properly hold that the statute was tolled by virtue of Section 16(i) from the date on which the United States filed a petition for leave to intervene in an administrative proceeding previously instituted by Mt. Hood[1] pursuant to and for the purpose of enforcing the Interstate Commerce Act where the United States' petition complained of nothing, made no charges and sought no relief?

STATEMENT OF THE CASE

This is a private antitrust action brought by Mt. Hood against Greyhound in the District Court for the District of Oregon under Section 4 of the Clayton Act, 15 U.S.C. § 15.

Mt. Hood and Greyhound Lines, Inc., are motor common carriers of passengers and express, operating under authority from and regulation by the ICC. Mt. Hood's principal routes run between Portland, Eugene and Albany, Oregon in the West and Salt Lake City, Utah in the East, and between Klamath Falls, Oregon in the South and Biggs and The Dalles, Oregon in the North.

Greyhound Lines, Inc., is wholly owned by The Greyhound Corporation, a diversified holding company. *See California Parlor Car Tours Co.*, 93 M.C.C. 392 (1963). (R. 1937-1939) Greyhound Lines has routes serving Portland, Eugene, Salt Lake City, Klamath Falls, Biggs and The Dalles over which it competes with Mt. Hood.

Between 1947 and 1954, Greyhound acquired ownership and control of eight bus lines in the western United States. Notwithstanding protests by Mt. Hood, the ICC approved the acquisitions, holding that they would benefit Greyhound and the public by producing economies, coordination and improvement of service. *See The Greyhound Corp.*, 50 M.C.C. 123, 140 (1947) (R. 1862); *The Greyhound Corp.*, 58 M.C.C. 809 (1952) (R. 1895-1904); *The Greyhound Corp.*,

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1. Respondent Mt. Hood Stages, Inc., doing business as Pacific Trailways, will be referred to as "Mt. Hood". Petitioners The Greyhound Corporation and Greyhound Lines, Inc., together will be referred to as "Greyhound".

45 M.C.C. 821 (1947); *The Greyhound Corp.*, 55 M.C.C. 801 (1948); *The Greyhound Corp.*, 55 M.C.C. 321 (1948); *The Greyhound Corp.*, 59 M.C.C. 657, 668-670 (1953); *The Greyhound Corp.*, 60 M.C.C. 643, 650-653 (1954).[2]

After unsuccessfully protesting to the ICC against most of those Greyhound acquisitions, Mt. Hood continued to complain about the manner in which Greyhound was quoting service and routing passengers over the acquired lines. From 1955 on, Mt. Hood repeatedly complained that Greyhound had instructed its agents in Oregon not to quote Mt. Hood's service, that it was not routing traffic over Mt. Hood's lines, and that these practices violated assurances Greyhound had given to the ICC in the acquisition cases. (Exs. 197, 215, 297, 303-A)

When Greyhound terminated a joint through bus arrangement with Mt. Hood effective September 8, 1964, Mt. Hood petitioned the ICC under Section 5(10) (formerly 5(9)) of the Interstate Commerce Act, 49 U.S.C. § 5(10), to reopen the acquisition cases "for further hearing to consider the necessity of attaching certain terms, conditions and limitations to the privileges therein granted . . . ." (A. 4. *See also* Mt. Hood's amended petition, A. 24)

On December 14, 1964, the United States filed a petition for leave to intervene in the ICC proceedings, urging the ICC to hold a hearing on the matter for the benefit of both parties. (A. 37-38) Its petition expressly declined to take a position on the merits of Mt. Hood's allegations. (A. 37) On May 27, 1965, the United States was given permission to intervene in the ICC proceeding, but the ICC specifically limited it to the Interstate Commerce Act issues raised by Mt. Hood's petition. (A. 43) The ICC rendered its decision

2. The relevant opinions and orders are in the record. Tr. 2197; R. 1844, *et seq.*

on Mt. Hood's petition in 1968. It found that each of the acquisitions had been approved as consistent with the public interest, and it declined to revoke any of those prior approvals. Instead, it entered a supplemental order under Section 5(10) of the Interstate Commerce Act modifying its prior orders and requiring Greyhound to conform to the public interest with respect to the joint through service, schedule connections and the quotation of Mt. Hood's service. *Mt. Hood Stages, Inc.*, 104 M.C.C. 449, 450, 462-463 (1968), *aff'd sub nom. Greyhound Lines, Inc. v. United States*, 308 F. Supp. 1033 (N.D. Ill. 1970).

Mt. Hood filed its original complaint in this action on July 5, 1968 (A. 46), and its last amended complaint on July 27, 1971 (A. 57). The case was tried before a jury in 1973, on the issue of alleged violations of Sections 1 and 2 of the Sherman Act, fraudulent concealment and damages. The jury returned a liability verdict for Mt. Hood. On the issue of alleged fraudulent concealment the jury found that Mt. Hood knew or should have known of its claims on December 14, 1960. (A. 82) The trial court, however, awarded Mt. Hood treble damages of $13,146,090 for the twenty-year period from 1953 to 1973. (A. 83, 86) It held that the government's petition to intervene in the ICC modification proceedings on December 14, 1964, tolled the statute of limitations under Section 5(i) of the Clayton Act. (A. 80) The result was that the four-year period was extended backwards in time to December 14, 1960 (the very day Mt. Hood was found to have discovered its claims), where it was combined with the "fraudulent concealment" to create a twenty-year damage period. The trial court then denied Greyhound's post-trial motions for judgment notwithstanding the verdict and for a new trial and awarded Mt. Hood

attorneys' fees of $1,250,000. (A. 87, 104-105) The Court of Appeals affirmed. (A. 108)

SUMMARY OF ARGUMENT

The Court of Appeals' decision holding the statute of limitations tolled under 15 U.S.C. § 16(i) by reason of the government's petition for leave to intervene in the ICC modification proceedings is directly contrary to the clear terms and requirements of that statute. The ICC proceedings were neither a civil or criminal proceeding "instituted by the United States," nor a proceeding "to prevent, restrain, or punish violations of any of the antitrust laws." Moreover, this antitrust case is not based on "any matter complained of in said proceeding," because the government's petition for leave to intervene in the ICC administrative proceedings did not complain of anything.

The Court of Appeals' decision is not only bad law, it is also bad policy. It would cause the four-year statute of limitations to be suspended in countless unforeseeable circumstances whenever the Antitrust Division of the Department of Justice participated in administrative proceedings. Such an open-ended expansion of the statute of limitations is directly contrary to the policies of repose and certainty that Congress sought to effectuate when it enacted a four-year statute.

ARGUMENT

I. The Court of Appeals' Decision Is Contrary to 15 U.S.C. § 16(i).

Tolling of the statute of limitations under Section 16(i) was essential to the award of all damages beyond the normal four-year period—some $5,194,617 after trebling. Section 16(i) provides:

> "Whenever any civil or criminal proceeding is *instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws,* but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private or State right of action arising under said laws and *based in whole or in part on any matter complained of in said proceeding* shall be suspended during the pendency thereof and for one year thereafter. . . ." 15 U.S.C. § 16(i)[3]

Not one of the statute's explicit requirements is satisfied here. The relevant facts are as follows:

On or about October 7, 1964, Mt. Hood filed with the ICC a "petition . . . for an order reopening [the Greyhound acquisition cases] for further hearing to consider the necessity of attaching certain terms, conditions and limitations to the exercise of the privileges therein granted . . . ." (A. 4. *See also* A. 23-24) On December 14, 1964, the United States petitioned for leave to intervene. The petition did not allege that Greyhound was violating the antitrust laws (or any other law), and it sought no relief or remedy against Greyhound. (A. 36, *et seq.*) It took no position on the merits of the dispute between Mt. Hood and Greyhound and expressly disclaimed any knowledge of the matters complained of by Mt. Hood:

> "We have no way of knowing whether those of Mt. Hood's allegations which Greyhound denies are true or false; resolution of such controversies is a typical function of a hearing." (A. 37-38)[4]

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3. All emphasis in this brief is added unless otherwise stated.

4. The government's primary purpose in seeking to intervene was to urge the ICC not to dispose of the case by summary action, but to hold a full hearing for the benefit of *both* parties, to determine "if" the evidence supported Mt. Hood's allegations. (A. 37-38, 40)

The United States was not permitted to intervene until May 27, 1965. It raised no new issues. Indeed, the ICC obviously considered the proceeding to have been already instituted and its scope defined for it specifically limited the government's participation to the Interstate Commerce Act issues Mt. Hood had raised:

> "[T]he permission to intervene herein granted shall not be construed to allow intervenors to introduce evidence which will unduly broaden the issues raised in this proceeding." (A. 43)[5]

The Court of Appeals held that these facts activated Section 16(i) and tolled the statute of limitations commencing December 14, 1964, the date on which the petition for leave to intervene was first filed, and four years to the day after the date on which Mt. Hood was later (coincidentally) found by the jury to have "discovered" its cause of action.

It is axiomatic that "[t]he starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 756 (1975) (Powell, J., concurring). The Court of Appeals failed to heed that principle; its interpretation is erroneous and contrary to Section 16(i) in every respect.

First, the holding applies Section 16(i) to a proceeding instituted by Mt. Hood, not the United States.[6] Indeed, the

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5. The ICC described those issues in its order assigning the matter for hearing:

> "[W]hether any supplemental order or orders should be issued *under section 5(9) of the Interstate Commerce Act* in any of the proceedings named in the attached appendix imposing or modifying conditions therein or an order issued *under any other appropriate section of the Act* in this proceeding with respect to whatever acts or facts *involving violation of the Act,* if any, may be proven at the said hearing." (A. 43)

6. Strictly speaking, the government sought permission to intervene in ICC approval proceedings "instituted" by Greyhound itself some ten to fifteen years earlier. (A. 36-37; pp. 3-4 above)

Court of Appeals specifically concedes that "Mt. Hood rather than the United States instituted the proceedings". (A. 133) A party who intervenes in a proceeding previously brought by someone else has not "instituted" that proceeding.

> "When the term [intervene] is used in reference to legal proceedings, it covers the right of one to interpose in, or become a party to, *a proceeding already instituted* . . . ." *Rocca v. Thompson,* 223 U.S. 317, 330 (1912).

Second, even if the United States could be said to have "instituted" the ICC proceeding, it did not "complain of" anything there on which this action is based. The decisions considering the applicability of Section 16(i) have uniformly held that the determination of whether a private action is based on matters "complained of" in a prior government action "in general . . . must be limited to a comparison of the two complaints on their face." *Leh v. General Petroleum Corp.,* 382 U.S. 54, 65 (1965); *accord, Luria Steel & Trading Corp. v. Ogden Corp.,* 484 F.2d 1016, 1022 (3d Cir. 1973), *cert. denied,* 414 U.S. 1158 (1974); *Rader v. Balfour,* 440 F.2d 469 (7th Cir.), *cert. denied,* 404 U.S. 983 (1971). Here, the United States' petition for leave to intervene did not charge Greyhound with any wrongdoing, took no position on the merits and sought no relief; therefore, this case is not based on any matter "complained of" by the government in the ICC proceeding, and Section 16(i) cannot apply to it. *Cf. Michigan v. Morton Salt Co.,* 259 F.Supp. 35, 44-45 (D. Minn. 1966), *aff'd sub nom. Hardy Salt Co. v. Illinois,* 377 F.2d 768 (8th Cir.), *cert. denied,* 389 U.S. 912 (1967) (Commencement of grand jury proceeding does not toll the statute under Section 16(i) because it is "investigative" and "has no immediate or direct goal of punishment, prevention, or restraint.").

Third, the Court of Appeals applied Section 16(i) to a proceeding brought under Section 5(10) of the Interstate Commerce Act, and which concerned only the enforcement of that Act. (A. 42-43) In no way could Mt. Hood's institution of that proceeding be considered an action to "prevent, restrain, or punish violations of any of the antitrust laws,"[7] and intervention by the United Stated did not change that. The United States was not seeking to have the ICC "prevent, restrain, or punish violations of any of the antitrust laws" either; indeed, it sought no relief at all. Moreover, the ICC is without power under Section 5 to enforce the Sherman Act; it enforces the Interstate Commerce Act and the National Transportation Policy. This Court has made that very clear:

> "[T]he [Interstate Commerce] Commission has no power to enforce the Sherman Act as such. It cannot decide definitively whether the transaction contemplated constitutes a restraint of trade or an attempt to monopolize which is forbidden by that Act. The Commission's task is to enforce the Interstate Commerce Act and other legislation which deals specifically with transportation facilities and problems." *McLean Trucking Co. v. United States,* 321 U.S. 67, 79 (1944).

Finally, the Court of Appeals erred in holding that Section 16(i) comes into operation on the date on which the United States first sought leave to intervene. What is now Section 16(i) was enacted in 1914 pursuant to President Wilson's proposal which urged Congress to establish a procedure to give

> "private individuals who claim to have been injured by these processes the right to found their suits for redress upon the facts and judgments proved and entered in suits by the Government *where the Government has upon its own initiative sued the combinations complained of* and won its suit, and that the statute of limitations shall be suffered to run against such litigants only from the date of the conclusion of the Government's action. It is not fair that the private litigant should be obliged to set up and establish again the facts which the Government has proved. He cannot afford, he has not the power, to make use of such processes of inquiry as the Government has command of." 51 Cong. Rec. 1964 (1914).[8]

It is apparent that one purpose of Section 16(i) is to give private litigants an opportunity to use the results of government enforcement efforts. *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.,* 381 U.S. 311, 317 (1965). Here the government had no right to participate and could take no antitrust enforcement action at all in the ICC proceedings until the ICC granted its petition to intervene. *See* ICC Rule 72(e), 49 C.F.R. § 1100.72(e) (1976). Until that date no benefits could possibly result to private litigants. Thus, the mere filing of the petition bears no more "logical relationship" to the statutory language or purpose than does the final administrative approval to file the petition or any other earlier act evidencing the government's intention or desire to attempt to participate in the ICC proceedings. None of these is an act that falls within Section 16(i). *See Dungan v. Morgan Drive-Away, Inc.,* No. 76-2681 (9th Cir., Jan. 13, 1978) (empanelling grand jury does not toll statute) (App. B pp. 8-10); *Michigan v. Morton Salt Co.,* 259 F.Supp. 35, 44 (D. Minn. 1966), *aff'd sub nom. Hardy Salt Co. v. Illinois,* 377 F.2d 768 (8th Cir.),

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7. The "antitrust laws" as used in Section 16(i) are specifically limited to the Sherman Act, Clayton Act and parts of the Wilson Tariff Act (as amended). *See* 15 U.S.C. § 12. That list is exclusive. *Nashville Milk Co. v. Carnation Co.,* 355 U.S. 373, 375-376 (1958).

8. President Wilson's message was frequently quoted during the course of the congressional debates to explain the purpose of the amendments. *See, e.g.,* 51 Cong. Rec. 9090, 9488 (1914).

cert. denied, 389 U.S. 912 (1967).[9] The petition was not granted until May 27, 1965, and that is the earliest date on which it could be said that the government "instituted" any proceeding within the meaning of Section 16(i), assuming that such a petition could ever be said to have that effect.[10]

In sum, the ICC case involved neither a civil or criminal proceeding "instituted by the United States," nor any proceeding "to prevent, restrain, or punish violations of any of the antitrust laws." And this case is not based on "any matter complained of in said proceeding" because the government did not complain of anything there. The Court of Appeals' holding that Section 16(i) applies to a petition of the United States for leave to intervene in an agency proceeding previously instituted by plaintiff to determine possible violations of the Interstate Commerce Act, which makes no charges, seeks no relief and is restricted to the issues framed by plaintiff, is in flat conflict with Section 16(i).

9. The government's petition might have been denied. Had it been, the statute clearly would not have been tolled. *See Dungan v. Morgan Drive-Away, Inc.*, No. 76-2681 (9th Cir., Jan. 13, 1978) (App. B p. 8) The order granting intervention could not retroactively toll the statute, because by then it had already run and there was nothing to toll.

The *Dungan* case was decided by a different panel of the Ninth Circuit than the panel which decided this case. The *Dungan* opinion has not yet been officially reported; it is reproduced as Appendix B to this brief.

10. This point, by itself, would have two effects on the judgment here. First, since the jury found that plaintiff knew or should have known of its claims on December 14, 1960, those claims were time barred after December 14, 1964, and Section 16(i) cannot rescue them because the petition to intervene was not granted until May 27, 1965. Second, any tolling under the section would extend the claim period back only to May 27, 1961. Since there is no evidence of the amount of damage suffered in the period May 27, 1961, to July 5, 1964, the verdict and judgment to that extent reflect an incorrect damage period. (*See* A. 83)

II. The Court of Appeals' Decision Is Contrary to Congress' Intent and to Sound Policy.

The Court of Appeals chose not to follow the "literal wording" of Section 16(i). (A. 132) Instead, purporting to follow the teaching of *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965), it relied upon its perception of the purpose of Section 16(i). It reasoned that tolling would serve the statute's purpose to permit "private litigants to have the benefits that may flow from governmental antitrust enforcement efforts" (A. 132-133), because it believed that the petition for leave to intervene was the "functional equivalent of a direct action." (A. 134) There are several defects in the Court of Appeals' reasoning.

First, while the statute's purpose may be salutary, it is not open-ended. It has explicitly defined limits, and therefore it will not support a decision so plainly contrary to the statute's terms as this one.

Second, the Court of Appeals has ignored the facts; the assumptions on which its reasoning rests are not valid. The government made no antitrust enforcement efforts here. It sought leave to intervene in a proceeding which in fact and by law was limited to the enforcement of the Interstate Commerce Act. Moreover, a petition such as this one, which made no complaint and which did not ask for any relief, is not remotely comparable to, let alone the "functional equivalent" of, a complaint filed in a federal court to punish or restrain antitrust violations.[11] Although the

11. The petition here is also obviously distinguishable from a Federal Trade Commission complaint brought to enforce the antitrust laws. *E.g., Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965). This case is also easily distinguished from cases holding the statute tolled by proceedings to enforce Section 5 of the Federal Trade Commission Act—assuming those cases were correctly decided. *See e.g., Luria Steel &*

Court of Appeals purported to rely upon "the substance of the government's intervention and participation before the Commission" in holding Section 16(i) applicable (A. 134), it ignored the fact that neither it nor the district court performed any analysis of the government's "participation" to determine whether it was the "functional equivalent of a direct action." Nor could any such analysis have been undertaken, for the record is devoid of any evidence of such participation.[12]

Third, Mt. Hood itself concedes that it derived no benefits from the government's intervention. Its expert witness on attorneys' fees, Mr. Blecher, testified:

Trading Corp. v. Ogden Corp., 484 F.2d 1016 (3d Cir. 1973), *cert. denied*, 414 U.S. 1158 (1974); *Rader v. Balfour*, 440 F.2d 469 (7th Cir.), *cert. denied*, 404 U.S. 983 (1971); *Lippa's, Inc v. Lenox, Inc.*, 305 F.Supp. 182 (D. Vt. 1969). All of those cases were brought under the antitrust laws themselves or under Section 5 of the Federal Trade Commission Act, the "major purpose" of which, as perceived by those courts, "is to prevent antitrust law violations". *See, e.g., Lippa's, Inc. v. Lenox, Inc.*, 305 F. Supp. 182, 188 (D. Vt. 1969). In all those cases the government had actually charged the defendant with and sought the prevention or punishment of specific anticompetitive conduct or antitrust violations, and a comparison of the FTC's charges with the private litigant's complaint showed that the private action was based on the matter complained of by the FTC. Here, in contrast, the government made no such charges, and the proceedings were pursuant to Section 5 of the Interstate Commerce Act which, far from being designed to prevent antitrust violations, was designed to encourage and immunize conduct which would otherwise violate the antitrust laws. 49 U.S.C. § 5(12); *see Minneapolis & St. L. Ry. v. United States*, 361 U.S. 173, 187 (1959); *County of Marin v. United States*, 356 U.S. 412, 416 (1958).

12. The Court of Appeals says that the ICC "proceedings were of a kind likely to produce benefits to . . . plaintiff in a subsequent antitrust suit," and that "governmental investigative and legal resources were made available to fully develop the facts and the law favorable to the common position of the government and Mt. Hood on these issues." (A. 133) Nothing is cited to justify those statements; they are utterly without any support in the record. The government's petition did not endorse Mt. Hood's charges or assert any position in "common" with Mt. Hood. (pp. 7-8 above.)

> "My review of the record in this case indicates that not only did the plaintiff not have the benefit of any prior Government adjudication, but, in fact, this record formed the basis of a concomitant proceeding before the Interstate Commerce Commission in which the anti-trust division convened [sic], and in which it secured a contempt citation for the conduct involved.
>
> "So that I think actually, here, *you have no benefit from what the Government did,* but you were simultaneously preparing the Government case in the private case." (A. 103; Tr. 6819. *See also* A. 97, 103)

Thus, the Court of Appeals' decision does not serve Congress' purpose at all. Moreover, the Court of Appeals' policy approach is entirely one-sided. It gives no weight whatever to the important policies that underlie the 1955 amendments to the Clayton Act which amended Section 16(i) and established a uniform four year statute of limitations. As another panel of the Ninth Circuit has observed, those amendments demonstrate that

> "Although . . . [Section 16(i)] serves the broad and beneficient purpose of aiding private antitrust litigants . . . it is also true that it is a statute of repose." *Dungan v. Morgan Drive-Away, Inc.*, No. 76-2681 (9th Cir., Jan. 13, 1978) (App. B p. 5).

The Senate Report accompanying the 1955 amendments (H.R. 4954) reflects congressional policy against "undue prolongation of [antitrust] proceedings" by extending the limitations period:

> "While the committee believes it important to safeguard the rights of plaintiffs by tolling the statute during the pendency of Government antitrust actions, it recognizes that in many instances the long duration of such proceedings taken in conjunction with a lengthy statute of limitations may tend to prolong stale claims, unduly impair efficient business operations, and over-

burden the calendars of courts. The committee believes the provision of this bill will tend to shorten the period over which private treble-damage actions will extend by requiring that the plaintiff bring his suit within 4 years after it accrued or within 1 year after the Government's case has been concluded.

"While the committee considers it highly desirable to toll the statute of limitations during a Government antitrust action and to grant plaintiff a reasonable time thereafter in which to bring suit, it does not believe that the undue prolongation of proceedings is conducive to effective and efficient enforcement of the antitrust laws." S. Rep. No. 619, 84th Cong., 1st Sess. 6 (1955). *See also* H.R. Rep. No. 422, 84th Cong., 1st Sess. 8-9 (1955).

The Attorney General himself supported the amendment. In a letter to Senator Kilgore, Chairman of the Senate Judiciary Committee, he stated in relevant part:

"Similarly, we favor enactment of a uniform statute of limitations. Currently, private antitrust action is *needlessly complicated* by issues such as which State's statute of limitations apply [sic], the events from which such statute run, and the *circumstances under which it may be told* [sic]. Finally, varying periods of limitations encourage 'forum-shopping' and seem ill-suited for enforcement of a uniform Federal policy." S. Rep. No. 619, *supra* at 7.

Accordingly,

"[I]n interpreting Section 16[(i)] [courts] must be guided not only by a Congressional intent to aid private litigants but also by its intent to make reasonably certain and predictable the determination of the duration within which a private antitrust suit must be brought." *Dungan v. Morgan Drive-Away, Inc.*, No. 76-2681 (9th Cir., Jan. 13, 1978) (App. B pp. 7-8).

The Court of Appeals' novel "functional equivalent" test fails to satisfy the congressional purpose of certainty and predictability. It would resurrect the very confusion and uncertainty respecting the application of the statute of limitations, including "the circumstances under which it may be tolled," that Congress sought to eliminate in 1955. It would require detailed review of the record in each proceeding to see what position the government ultimately took and whether the government's participation was or was not the "functional equivalent" of direct action. The government may be with one party on one issue, with the other on a second and with neither on a third. Or, it may change its position. For example, in *Denver & R.G.W.R.R. v. United States*, 387 U.S. 485 (1967), the government intervened in an ICC proceeding with one position, adopted another and then "completely reversed" itself before the case was concluded. 387 U.S. at 490-492. Thus, the Court of Appeals' decision would mean that it might be impossible to determine whether government proceedings would toll the running of the statute until those proceedings were finally resolved.[13] That creates more problems than it solves, as even the Court of Appeals seems to recognize. (A. 133, n. 31) *See Dungan v. Morgan Drive-Away, Inc.*, No. 76-2681 (9th Cir., Jan. 13, 1978) (App. B p. 10); *Cf. Leh v. General Petroleum Corp.*, 382 U.S. 54, 65 (1965). The uncertainty created by the decision below by itself provides a compelling reason to reverse it.

Finally, the ramifications of the Court of Appeals' extension of Section 16(i) are truly alarming. The number and

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13. Moreover, in some administrative proceedings, government participation may even occur without notice to the subsequent private treble-damage defendant, leaving him in a position where he had no reason to preserve records and other information necessary for his defense during the period of the administrative proceedings.

variety of regulatory proceedings in which the Justice Department participates to express its views are legion.[14] No one previously has even suggested that the statute of limitations was tolled by reason of such participation. Unless this Court acts, the Court of Appeals' decision will revive countless stale antitrust claims previously believed by everyone to be long since gone.

---

14. The Associate Attorney General in charge of the Antitrust Division is charged with responsibility for:

> "Intervention or participation before administrative agencies functioning wholly or partly under regulatory statutes in administrative proceedings which require consideration of the antitrust laws or competitive policies, including such agencies as the Civil Aeronautics Board, Interstate Commerce Commission, Federal Communications Commission, Federal Maritime Commission, Federal Power Commission, Federal Reserve Board, Federal Trade Commission, Nuclear Regulatory Commission, and Securities and Exchange Commission, . . ." 28 C.F.R. § 0.40(b) (1976), as amended in 42 Fed. Reg. 15315 (March 21, 1977).

The Antitrust Division takes its responsibilities seriously. *See, e.g.*, Appendix F to the petition for certiorari.

CONCLUSION

The judgment of the Court of Appeals should be reversed and the case remanded with instructions to eliminate any claim or award of damages for the period prior to July 5, 1964, and for further proceedings consistent with the decision.[15]

Respectfully submitted,

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15. Proceedings on remand should include consideration of whether Greyhound is entitled to a new trial due to the admission of vast quantities of highly prejudicial evidence of conduct which occurred well prior to the limitations period, and which would not have been admitted had the court properly interpreted Section 16(i). Virtually all of Mt. Hood's evidence related to pre-limitations events. Among other things, the trial court admitted into evidence government consent decrees entered in 1947 and 1957, seventeen and seven years, respectively, prior to the limitations period, as well as evidence of ICC approved acquisitions that were both expressly immunized from antitrust liability and time barred by more than ten years. The result was that Greyhound was condemned for past acts as to which Mt. Hood could not properly claim damages. *See International Shoe Machine Corp. v. United Shoe Machine Corp.*, 315 F.2d 449, 459-460 (1st Cir.), *cert. denied*, 375 U.S. 820 (1963). At a minimum, proceedings on remand would include modification of the attorneys' fees award to reflect the change in the "result achieved." (A. 104)

Appendix

Appendix A

Statutes Involved

Section 4B of the Clayton Act, 15 U.S.C. § 15b, provides as follows:

> Any action to enforce any cause of action under sections 15, 15a, or 15c of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections.

Section 5(i) of the Clayton Act, 15 U.S.C. § 16(i), provides as follows:

> Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private or State right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 or 15c of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

Appendix B

United States Court of Appeals,
Ninth Circuit.

J. M. DUNGAN, as Trustee for ABC Towing Service of Salinas, Inc., a bankrupt corporation,

Plaintiff-Appellant,

v.

MORGAN DRIVE-AWAY, INC., National Trailer Convoy, Inc., and Transit Homes, Inc.,

Defendants-Appellees.

No. 76-2681.
Jan. 13, 1978.

Appeal from the United States District Court for the Northern District of California.

Before HUFSTEDLER, SNEED and KENNEDY, Circuit Judges.

SNEED, Circuit Judge:

Plaintiff-appellant Dungan, as Trustee for the ABC Towing Service of Salinas, Inc., a bankrupt corporation, instituted this private antitrust treble damage action on August 20, 1975. It is acknowledged that any such action accrued no later than April 23, 1969, the date ABC Towing Service of Salinas, Inc. filed its petition in bankruptcy. The cause of action, therefore, appears barred because, as required by 15 U.S.C. § 16(b), it was not commenced "within four years after the cause of action accrued."

To avoid this conclusion plaintiff points to that portion of 15 U.S.C. § 16(a) which suspends the running of the statute of limitations during the pendency of "any civil or criminal proceeding . . . instituted by the United States" and for one year thereafter and contends that the empanelling on February 7, 1972 of the grand jury which subsequently indicated the defendant-appellees, suspended the running of limitations as of that date. This suspension, occurring within four years from the accrual date of the cause of action, should preserve the cause until the expiration of one year following the termination of the criminal proceeding. Inasmuch as these proceedings at the earliest were terminated by the appellees entering pleas of *nolo contendere* and being sentenced on September 27, 1974, a complaint filed on August 20, 1975 should be regarded as well within the permissible one year.

The defendants, however, insist that the empanelling of a grand jury did not suspend the running of limitations. Only an indictment so functions and in this instance the indictment was issued on August 2, 1973, a date more than four years subsequent to the date the cause of action accrued. The cause, therefore, should be barred by limitations the defendants contend.

Accordingly the defendants moved for summary judgment after the above facts were revealed by the complaint and developed through depositions. The motion was granted by the district court. We affirm.

I.

Purposes Served By Tolling Provisions of 15 U.S.C. § 16(b).

Plaintiff rests his case on the purposes Congress intended to serve in enacting those provisions of the Clayton Act

which now constitute 15 U.S.C. § 16(a) and (b).[1] Section 16(a) makes final judgments or decrees resulting from civil or criminal proceedings brought by the United States prima facie evidence in any action under federal law brought by a private party against the same defendant. Section 16(b), however, is not limited in scope to being only "a logical backstop for the prima facie evidence clause of 5(a) [15 U.S.C. § 16(a)]" *Minnesota Mining v. N. J. Wood Co.*, 381 U.S. 311, 319, 85 S.Ct. 1473, 1477, 14 L.Ed.2d 405 (1965). Its purpose has been described by the Supreme Court in *Minnesota Mining* as follows:

> "As we have pointed out, the textual distinctions as well as the policy basis of § 5(b) indicate that it was to serve a more comprehensive function in the congressional scheme of things. The Government's initial action may aid the private litigant in a number of other ways. The pleadings, transcripts of testimony, exhibits and documents are available to him in most instances. In fact, the rules of the Commission so provide. 16 CFR § 1.132(e). See generally 16 CFR § 1.131 et seq. Moreover, difficult questions of law may be tested and definitively resolved before the private litigant enters the fray. The greater resources and expertise of the Commission and its staff render the private suitor a tremendous benefit aside from any value he may derive from a judgment or decree. Indeed, so useful is this service that government proceedings are recognized as a major source of evidence for private parties."

Minnesota Mining v. N. J. Wood Co., supra, at 319, 85 S.Ct. at 1477. This purpose expresses a "desire that private parties be permitted the benefits of prior government actions." *Id.* at 320, 85 S.Ct. at 1478. Such a purpose, plaintiff insists, in this case can be served adequately only by interpreting the statutory language "Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws" as embracing the empanelling of a grand jury. Only in that manner can a private party situated as is the plaintiff here get the full benefits of the government's prior actions.

Although the plaintiff is correct in asserting that 15 U.S.C. § 16(b) serves the broad and beneficent purpose of aiding private antitrust litigants, so as to use "private self-interest as a means of enforcement" of antitrust laws, *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 751, 67 S.Ct. 1015, 1019, 91 L.Ed. 1219, it is also true that it is a statute of repose. This feature emerges clearly when one considers the purposes of the Act of July 7, 1955, 69 Stat.

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1. 15 U.S.C. § 16(a) and (b):

(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided,* That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title.

(b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

282, which amended 15 U.S.C. § 16(b). Prior to this Act § 16(b) merely suspended the running of the limitations period, the limits of which were fixed by state law. This led to considerable confusion in computing the correct period within which a suit was required to be brought.[2] To elimi-

2. S.Rep.No. 619, 84th Cong., 1st Sess. 2 (1955), *reprinted in* 1955 U.S.Code Cong. & Admin. News, pp. 2330, 2331.

"As previously indicated, the antitrust laws grant to private parties the right to bring a suit for treble damages to avenge injuries suffered through violations thereof. While this is a federally accorded right of action, at the present time private treble-damage cases are governed by State statutes of limitation.

Under this ruling a number of anomalous situations may arise. A plaintiff located in State A who is injured by a conspiracy may find himself barred by the local statute of repose, whereas an injured party in State B, wronged by the very same collusive action, may still have a valid cause of action. While this may be unjust insofar as plaintiffs are concerned, defendants fare little better under the rule. Where conspiracies occur on a nationwide level and it is determined that the limitation law of the place of injury governs the case, a plaintiff injured in several jurisdictions is permitted to select as his forum the State with the most favorable statute. In such cases, the defendant remains in constant jeopardy until the longest period of limitations has transpired. Also adding to the confusion is the frequently present problem of a conflict of laws in determining which State statute is controlling, the law of the forum or that of the situs of the injury.

Even when the State whose statute of limitations is applicable has finally been ascertained, there remains still another hurdle to be overcome, namely the selection of the appropriate law of the State that governs private treble-damage proceedings. The problem is complicated in many instances by virtue of the fact that statutes of limitation must frequently be chosen from those pertaining to the ancient common-law forms of action such as trespass to persons and property, damage to property, and actions in the nature of actions on the case. In those instances where the State law has established a special statute of limitations for actions upon a liability created by statute, the selection of the proper limitation period may be immeasurably easier. Even here, however, confusion as to the correct limitation period abounds.

• • • • •

It is one of the primary purposes of this bill to put an end to the confusion and discrimination present under existing law where local statutes of limitations are made applicable to

nate this confusion the Act established a uniform statute of limitations of 4 years and provided the suspension of the statute would extend "during the pendency" of the federal civil or criminal proceeding and "for one year thereafter." Finally, the Act provided that, in the event the new uniform 4-year statute is tolled, "any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued." In this manner the termination date of the limitations period was designed to afford private litigants an opportunity to take advantage of the government's efforts and to make its calculation reasonably certain.[3]

We, therefore, in interpreting section 16(b) must be guided not only by a Congressional intent to aid private litigants but also by its intent to make reasonably certain and predictable the determination of the duration within

rights granted under our Federal laws. This will be accomplished by establishing a uniform statute of limitations applicable to all private treble damage actions as well as Government damage actions, of 4 years."

3. S.Rep.No. 619, 84th Cong., 1st Sess. 2 (1955), *reprinted in* 1955 U.S.Code Cong. & Admin. News, pp. 2330, 2332.

"This bill makes several important changes in the tolling provisions of existing law. As presently written section 5 of the Clayton Act tolls the statute of limitations with respect to private treble-damage suits during the pendency of a suit by the United States to punish or restrain violations of the antitrust laws. This period of tolling is continued by the present bill with several modifications.

There are many instances where the statute of limitations as to a private cause of action may nearly have expired before suit is instituted by the Government under the antitrust laws. Although the statute is tolled during the pendency of the proceedings brought by the United States, the plaintiff in a treble-damage action may find himself hard pressed to reap the benefits of the Government suit if, upon its conclusion, he has but a short time remaining to study the Government's case, estimate his own damages, assess the strength and validity of his suit, and prepare and file his complaint. To alleviate

which a private antitrust suit must be brought. Our interpretation is important because, not only will it fix the period within which a suit may be brought, it also will affect, by fixing the duration of the period of suspension, the period of time with respect to which damages may be recoverable.

II.

Plaintiff's Interpretation Inconsistent With Section 16(b)'s Statute-of-Repose Purpose.

[1, 2] Plaintiff in effect argues that any interpretation which will extend the period within which a private suit can be brought serves to aid private litigants and is thus an interpretation intended by Congress. As indicated above, this ignores the statute-of-repose purpose of section 16(b). To serve that purpose we should eschew an interpretation which could introduce at another critical point in the calculation of the total period within which a suit may be brought a degree of uncertainty even greater than that which Congress eliminated in 1955. Plaintiff's expansive reading of Congressional intent undoubtedly would lead to just that. In calculating the expiration point of the time within which a suit may be brought uncertainty about when suspension of the running of the four-year statute commences would be as troublesome as were the uncertainties to which the 1955 Act was addressed.

Our description of the plaintiff's argument is not a straw-man we have devised to conceal the force of his position. It is true that the date of empanelling is a fixed and certain

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such difficulties, the present bill would extend the tolling period not only for the duration of the Government's antitrust suit, but for 1 year thereafter. This would guarantee all plaintiffs an adequate period in which to take advantage of Government antitrust proceedings."

date. The difficulty with its selection is that it bears no logical relationship to an event to which we can attach the statutory language "Whenever any civil or criminal proceeding is instituted to prevent, restrain, or punish violation of any of the trust laws, ..." Proceedings are "instituted" either before or after empanelling of the grand jury. Mere empanelling "institutes" nothing. It is either commencing the investigation, presenting to the grand jury, or returning the indictment that does that. If empanelling should be deemed meaningful *only* when an indictment ultimately is returned, it is the indictment which is the operative "institution" of proceedings, not the empanelling of the grand jury. To relate the date of the suspension back to the empanelling of the grand jury makes no more sense than relating it back to the date final administrative approval of the prosecution was given or any other earlier date with respect to which there exists proof that the government had determined to investigate possible antitrust violations by the defendant. On the other hand, if the date the grand jury is empanelled is deemed meaningful even if *no* indictment is returned then it is clear that it is merely an arbitrary date selected to signify that at some prior date the government decided to investigate the defendant for antitrust violations.

The short of the matter is that there exists little reason, other than it fits the needs of the plaintiff's case, to accept the date of grand jury empanelling as the date suspension commences. The date of the return of an indictment fits comfortably within the statutory language while empanelling the grand jury does not. The latter is not an act having as its purpose the prevention, restraint, or punishment of violations of the antitrust laws. The initiation of an investigation or a decision to prosecute more comfortably fits the statutory language than does empanelling the grand jury. Were we to select empanelling today, these more ap-

propriate times would be selected tomorrow. To select either, however, would introduce great uncertainty in fixing the time at which the suspension period commences. This would frustrate the statute-of-repose purpose of section 16(b). We decline to embark on a course that could lead to such an end.

III.

Practical Difficulties In Accepting Plaintiff's Position.

In reaching our conclusion we have also been influenced by a desire to avoid certain practical difficulties relating to grand jury secrecy which the plaintiff's position would involve. See Rule 6(e), Fed.R.Crim.P. (as amended Oct. 1, 1977). Section 16(b) suspends the limitation period "in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding . . . ." To determine whether proceedings before a grand jury involved "any matter complained of" upon which a private right of action is based in whole or in part, grand jury proceedings would be required to be carefully scrutinized. Moreover, considerable judicial time would be consumed in striking the exquisite balance between serving the objects of grand jury secrecy on the one hand and those of section 16(b), as interpreted by the Supreme Court in *Minnesota Mining Co.*, on the other. *Cf. U. S. Industries, Inc. v. United States District Court*, 345 F.2d 18 (9th Cir. 1965). This task would be especially difficult when no indictment of the antitrust defendant was returned. Plaintiff suggests an *in camera* proceeding (initiated undoubtedly in some instances by no more than uninformed suspicion) in which the trial court would sift the grand jury proceedings for "any matter complained of" on which the plaintiff's suit might be based. To an impractical degree the plaintiff's position imposes upon the trial court a

highly complex and difficult task whereas that task is relatively simple so long as we adhere to the date an indictment is returned as the date criminal proceedings which suspend the 4-year limitation period commence. *See State of Michigan v. Morton Salt Company*, 259 F.Supp. 35, 45 (D.Minn. 1966). Adherence to such a date may not eliminate all necessity to strike the exquisite balance in view of the teaching of *Minnesota Mining, Inc. and Leh v. General Petroleum Corp.*, 382 U.S. 54, 58-59, 86 S.Ct. 203, 15 L.Ed.2d 134 (1965); but it does confine the task to substantially more manageable proportions than would otherwise be the case.

Concerns rooted in a desire to improve judicial efficiency must occupy a low order of priority when either the commands of Congress or the insistent summons of justice so indicate; however, they occupy a high order when neither so do. This is the situation which this case presents.

AFFIRMED.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-598

THE GREYHOUND CORPORATION AND GREYHOUND LINES, INC.,
Petitioners,

vs.

MT. HOOD STAGES, INC.,
doing business as PACIFIC TRAILWAYS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-598

THE GREYHOUND CORPORATION AND GREYHOUND LINES, INC.,
Petitioners,

vs.

MT. HOOD STAGES, INC.,
doing business as PACIFIC TRAILWAYS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF ON THE MERITS

STATUTES INVOLVED

The statutes involved are sections 4, 4B, 5(i), 11(a) and 16 of the Clayton Act, 15 U.S.C. §§ 15, 15b, 16(i), 21(a) and 26 and Section 5(10) of the Interstate Commerce Act, 49 U.S.C. § 5(10). Petitioners have set forth Clayton Act §§ 4B and 5(i) in the Appendix to their brief. Sections 4, 11(a) and 16 of the Clayton Act and Section 5(10) of the Interstate Commerce Act are set forth in Appendix A hereto.

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly affirmed the District Court's decision that the statute of limitations was tolled pursuant to 15 U.S.C. § 16(i) when the United States, acting through the Justice Department (Antitrust Division), intervened as a party to ICC proceedings commenced by Mt. Hood under 49 U.S.C. § 5(10) [formerly § 5(9)] and thereafter prosecuted those proceedings with Mt. Hood for the purpose of preventing Greyhound's destructive competition in violation of the antitrust laws.

2. Whether the statute of limitations was also tolled pursuant to the doctrine of equitable tolling when Mt. Hood commenced the ICC action for the purpose of (a) preventing Greyhound's predatory conduct and (b) invoking the ICC's primary jurisdiction to determine whether Greyhound's predatory conduct was approved and therefore exempt from the antitrust laws or was disapproved and therefore subject to the antitrust laws.[1]

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[1]The Court of Appeals affirmed the District Court's decision as to §16(i) tolling and therefore declared, "We need not reach Mt. Hood's contention that the statute of limitations was tolled on December 14, 1960 [sic] by virtue of Mt. Hood's commencement of the Section 5(9) proceedings". (A. 137) The Supreme Court may affirm a judgment upon any grounds, regardless of whether the grounds were considered by the courts below. *Scheik v. Alberto Culver Co.*, 417 U.S. 506, 525 (1974) (dissent); *Walling v. General Industries Co.*, 330 U.S. 545, 547 n. 5 (1947); *Public Service Commissioner of Puerto Rico v. Havemeyer*, 296 U.S. 506, 509 (1936); *Langnes v. Green*, 282 U.S. 531, 535-539 (1931); *United States v. American Railway Express*, 265 U.S. 425, 435-36 (1924).

STATEMENT OF THE CASE

Mt. Hood Stages, Inc. ("Mt. Hood") and Greyhound Lines, Inc. are motor carriers of passengers and express, subject to regulation by the Interstate Commerce Commission ("ICC"). Greyhound Lines, Inc. ("Greyhound") is wholly owned by The Greyhound Corporation. Greyhound operates routes throughout the United States; it controls over 80% of all intercity bus traffic in the 11 Western states (Ex. 428-A); and its route authority surrounds that of Mt. Hood. (Ex. 471-A) Because Mt. Hood's "bridge" routes between several cities in Oregon, Idaho and Utah are more direct than Greyhound's routes, Mt. Hood is able to provide faster service than Greyhound to passengers moving between those cities. (Ex. 471-A; A. 22)

During 1947-1954, Greyhound embarked upon a program to acquire control of eight independent bus companies which operated in the Pacific Northwest and whose routes connected with Mt. Hood's routes. (A. 110; R. 1844, *et seq.*) Mt. Hood was concerned that once Greyhound completed its encirclement of Mt. Hood by acquiring those independent carriers, Greyhound might proceed to "longhaul" passengers over its circuitous routes and disrupt connections with Mt. Hood so as to destroy Mt. Hood's direct service. (Tr. 3410) Mt. Hood therefore protested most of those acquisitions. (A. 110) At the acquisition hearings, Greyhound repeatedly assured the ICC and Mt. Hood—under oath—that it would not engage in destructive practices toward Mt. Hood if the acquisitions were approved. (*Mt. Hood Stages, Inc.*, 104 MCC 449 (1968); A. 110-12) Both Mt. Hood and the ICC relied upon Greyhound's

sworn assurances and the ICC, basing its decisions thereon, approved the acquisitions. Neither Mt. Hood nor the ICC discovered until many years later that Greyhound's representations were false and that Greyhound had been consistently and covertly longhauling passengers around Mt. Hood from the beginning. (*Mt. Hood Stages, Inc.*, 104 MCC 449, 459-63 (1968); A. 110-12)

On July 6, 1964, Greyhound broke connections and cancelled joint through bus service with Mt. Hood. Because Mt. Hood was then surrounded by Greyhound and thus substantially dependent upon Greyhound for traffic, Greyhound's actions threatened grave harm to Mt. Hood's business. On October 7, 1964, after Greyhound had refused Mt. Hood's pleas to restore connections, Mt. Hood petitioned the ICC for relief. (A. 4) Just over 60 days later, on December 14, 1964, the Antitrust Division of the Justice Department petitioned to intervene as a party for the purpose of preventing Greyhound from engaging in predatory behavior which violated the antitrust laws. (A. 36)

Since its intervention, the Justice Department has vigorously prosecuted the ICC case with Mt. Hood. On April 5, 1968, the ICC (Division Three) affirmed the Hearing Examiner's report and found that Greyhound's practices constituted "destructive competition," were "not consistent with the public interest," were "inconsistent with their representations made in various Section 5 proceedings" and "were inspired by a desire to stifle competition" and "injure or destroy Mt. Hood." *Mt. Hood Stages, Inc.*, 104 MCC 449, 459-63 (1968). The full panel of the ICC affirmed the Division Three order. (Exs. 426)

On July 5, 1968, promptly after the ICC's first decision, Mt. Hood commenced this action for damages. (A. 46) While Mt. Hood was prosecuting this action, Greyhound was resisting the ICC's cease and desist orders. The United States District Court in Chicago affirmed the ICC's orders and granted the government's request for an injunction prohibiting Greyhound from continuing its predatory behavior. *Greyhound Lines, Inc. v. United States*, 308 F.Supp. 1033 (N.D. Ill. 1970). Greyhound thereafter wilfully disobeyed the court injunction as well as the ICC orders. In June 1973, the District Court in Chicago found Greyhound guilty of criminal and civil contempt and imposed fines and probation. *United States v. The Greyhound Corp.*, 363 F.Supp. 525 (N.D. Ill. 1973). The District Court's judgment was affirmed by the Seventh Circuit. *United States v. The Greyhound Corp.*, 508 F.2d 529 (7th Cir. 1974). Two months before the contempt judgment, in May 1973, the jury in this action had found the same conduct violated §1 and §2 of the Sherman Act. (A. 82-3)

The jury also found Greyhound had fraudulently concealed its antitrust violations until July 4, 1964, but that Mt. Hood had notice of the fraudulently concealed violations on December 14, 1960.[2] It found that Mt. Hood sus-

[2]Greyhound implies the jury's verdict with respect to Mt. Hood's notice was fortuitous, i.e., that it was "coincidentally" just four years prior to the date of the government's intervention. There was nothing fortuitous about it. The jury found that Mt. Hood was put on notice on December 14, 1960 because the form of special verdict, requested by Greyhound over Mt. Hood's objection, required the jury to pick a specific date. (Tr. 6093-7) Since the jury was given the difficult task of picking a specific date on which Mt. Hood discovered Greyhound's antitrust violations, it selected the most conservative date under the Court's instructons on § 16(i) tolling—December 14, 1960.

tained $1,105,057 damages from January 1, 1953, to December 15, 1960, and that Mt. Hood sustained $626,482 damages from December 15, 1960, to July 5, 1964. (A. 82-3) The courts below held the statute of limitations was tolled for the period 1953-60 by reason of fraudulent concealment and for the period 1960-64 by reason of 15 U.S.C. §16(i).

SUMMARY OF ARGUMENT

The Court of Appeals' decision holding the statute of limitations tolled under 15 U.S.C. §16(i) is consistent with both the language and purpose of that statute as construed by this Court. The ICC proceedings were jointly prosecuted by Mt. Hood and the Justice Department to prevent antitrust violations. The Justice Department's intervention therein was necessarily the functional equivalent of a direct court action and therefore constituted the institution of a government action to prevent violations of the antitrust laws. Mt Hood's later damage action was based upon matters "complained of in said proceeding," including matters about which the government had complained and sought to have enjoined. The Court of Appeals' decision was also consonant with the clear purpose of §16(i), as declared by this Court and several lower federal courts, to ensure antitrust victims the benefit of government antitrust enforcement efforts.

The Court of Appeals' affirmance of the District Court is further supported by the equitable doctrine of tolling, enunciated in prior decisions of this Court to prevent injustice. Tolling the statute of limitations while Mt. Hood necessarily sought preliminary assistance from the agency

having primary jurisdiction of the matters alleged and exclusive jurisdiction to grant Mt. Hood's request for injunctive relief promotes important federal policies expressed in the Clayton Act and the doctrine of primary jurisdiction, without frustrating the statute of limitations' policy of repose.

ARGUMENT

I. THE COURT OF APPEALS' DECISION WAS IN ACCORDANCE WITH 15 U.S.C. §16(i)

The Court of Appeals affirmed the District Court's decision that, pursuant to 15 U.S.C. §16(i), the government's intervention and participation as a party to the ICC proceedings tolled the statute of limitations from December 14, 1964. Those decisions squared with both the language and the purpose of §16(i) as construed by this Court in *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965), *Leh v. General Petroleum Corp.*, 382 U.S. 54 (1965), and *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971). Greyhound's niggardly construction of §16(i) not only destroys the ordinary meaning of its language but also ignores this Court's plain holding in *Minnesota Mining:* The "pivotal question" to be answered is "whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances." (381 U.S. at 321) Both courts below heeded that mandate. Circuit Judge Browning declared:

> "Where one possible interpretation of the language would effect the congressional purpose and another defeat it, the former is to be adopted. [*Minnesota*

Mining] The clearly expressed purpose of §16(i) is to further effective enforcement of the antitrust laws by permitting private litigants to have the benefits that may flow from governmental antitrust enforcement efforts. [citation]. This purpose would be served by interpreting §16(i) to encompass the government's intervention and participation in the §5(9) proceedings before the Commission—a reading the language readily permits." (A. 132-3)

A. The ICC Action Was Prosecuted Jointly By The Government And Mt. Hood "To Prevent, Restrain Or Punish Violations . . . Of The Antitrust Laws" (15 U.S.C. §16(i))

Both courts below were correct in holding that the purpose of the ICC proceedings was to "prevent" or "restrain" violations of the antitrust laws within the purview of §16(i). That governmental action to prevent antitrust violations was taken before an administrative agency does not preclude the availability of §16(i). *Minnesota Mining*, supra. Nor is it necessary to §16(i) that the agency proceedings be commenced "under" the antitrust laws. *Rader v. Balfour*, 440 F.2d 469 (1971), *cert. denied*, 409 U.S. 983 (1971); *Luria Steel & Trading Corporation v. Ogden Corporation*, 484 F.2d 1016 (3rd Cir. 1973), *cert. denied*, 414 U.S. 1158 (1974). It is sufficient that governmental action was taken to prevent conduct which violates the antitrust laws or, as declared in *Rader*, that it was "directed at alleged conduct which appears to involve an existing or incipient violation of the antitrust laws." (440 F.2d at 473)

The thrust of the ICC action, jointly prosecuted by the United States and Mt. Hood, was just that. Mt. Hood petitioned the ICC "for issuance of a general order which

will have the effect of prohibiting the discriminatory and destructive competitive practices hereinbefore described" (A. 34) and alleged that Greyhound's practices "represent in the aggregate a purpose on the part of Greyhound to . . . drive Mt. Hood out of business" (A. 31) and that "Greyhound's monopoly over most of the main routes in the Pacific Northwest gives it a traffic originating advantage which, if unrestrained and unfairly used, will enable it to starve out Mt. Hood." (A. 34)

The Court of Appeals properly held that "the government's petition to intervene demonstrates that its interest lay in the possibility of antitrust violations should Mt. Hood's allegations prove correct." (A. 135) Greyhound has even acknowledged that the Justice Department's intervention was "to assure the adequate consideration of the antitrust issues." (R. 1374; A. 136) There can be no question about this. The Justice Department declared that Greyhound's practices, as alleged, "have in the aggregate the appearance of a studied effort to force Mt. Hood out of business" (A. 37); that "the need for sharp surveillance of any abuse of the power these acquisitions have given Greyhound and for prompt action to correct any such abuse has become more important as Greyhound's encirclement of Mt. Hood has become more complete with each successive acquisition" (A. 39); that Mt. Hood "has necessarily become increasingly vulnerable to attack by Greyhound and increasingly dependent upon Greyhound for survival" (A. 39); and that "if the evidence supports Mt. Hood's other allegations of predatory conduct on the part of Greyhound it [the ICC] could conceivably save an independent carrier from extinction at the hands of an infi-

nitely more powerful rival." (A. 40) The government concluded:

> "Behind the immediate issues before the Commission are further issues of applicability of the antitrust laws. The Commission's approvals of the acquisitions relieved Greyhound and its officials from accountability under these laws only to the extent necessary to put the acquisitions into effect. While actions taken to give effect to the acquisitions are completely immune, exercise of economic power the acquisitions conferred so as to isolate and destroy a competitor is not." (A. 40-41)

Hence is it plain enough that Mt. Hood and the Justice Department were seeking to "prevent . . . violations . . . of the antitrust laws." It is also plain that the ICC, in granting the cease and desist order sought by the parties, was enforcing the antitrust laws. The ICC declared that "the antitrust laws and the national transportation policy . . . offer certain broad guidelines to be kept in mind in determining this proceeding," *Mt. Hood Stages, Inc.*, 104 MCC 449, 451 (1968) and that "actions which are not in themselves unlawful may be unlawful when they are part of a plan to monopolize or restrain commerce." (104 MCC at 458) The ICC found Greyhound's behavior "constitutes destructive competition in contravention of the national transportation policy." (104 MCC at 463) In affirming, the full panel of the ICC ordered Greyhound to cease and desist several practices which had been found to be "unreasonable and inconsistent with Greyhound's representations" to the ICC and "such other discriminatory and destructive practices which foreclose competitive and traffic patterns unreasonably and unnecessarily, without

regard for adverse effects on Mt. Hood." (Ex. 426) Affirming the ICC and finding Greyhound had engaged in "destructive competition", the District Court declared:

> "It is inconceivable to us that Congress intended that destructive practices made possible by acquisition approvals may not be corrected by supplemental order under Section 5(9), especially in light of the ICC's duty to take the antitrust policy of the United States into account in its decision making." *Greyhound Lines, Inc. v. United States*, 308 F.Supp. 1033, 1038 (N.D. Ill. 1970).

In granting the injunctive relief sought by the Justice Department and Mt. Hood against Greyhound's "destructive practices", the ICC was acting in accordance with this Court's decisions which hold that the ICC has a duty to enforce the antirust laws. *Denver & R. G. W. R. Co. v. United States*, 387 U.S. 485 (1967); *see also, United States v. ICC*, 396 U.S. 491 (1970); *Port of Portland v. United States*, 408 U.S. 811 (1972); *Gulf States Utilities Co. v. FPC*, 411 U.S. 747 (1973). Reversing a District Court affirmance of the ICC's refusal to consider antitrust issues presented by Greyhound's acquisition of stock of another carrier in another case, *Denver, supra*, this Court cited the ICC's "statutory obligations to protect the public interest and to enforce the antitrust laws." (387 U.S. at 498) The Court observed that the ICC is vested with the power under 15 U.S.C. §21 to enforce various provisions of the Clayton Act, including §7 (15 U.S.C. §18), whereas 15 U.S.C. §26 prohibits the antitrust victim from obtaining injunctive relief in a District Court against such violations. This restriction, the Court declared, "underscores

the ICC's responsibility to act when such violations are brought to its attention." (387 U.S. at 502)[3]

B. Civil Proceedings Were "Instituted By The United States" When the Justice Department, Acting On Behalf Of The United States, Intervened As A Party To The ICC Action

Both courts below also held that the Justice Department's intervention in the ICC case was the functional equivalent of a civil proceeding "instituted by the United States" within the purview of §16(i). That construction is consistent with the language of §16(i). There was no government "civil proceeding" prior to the Justice Department's intervention on behalf of the United States; there was thereafter. Government proceedings were therefore

[3]Greyhound implies that the ICC can only enforce the Clayton Act, not the Sherman Act, and that §16(i) is not applicable because Mt. Hood's damage action was brought under the Sherman Act. But the ICC's responsibility to consider the antitrust laws is not limited to the Clayton Act. This Court declared in *Gulf States Utilities Co. v. FPC*, 411 U.S. 747, 761 (1973) that the ICC "is charged with responsibility for considering antitrust policy under its statute". Citing the *Denver* ruling for support, the Court observed in *Gulf States:* "[t]he fact that the ICC has a specific obligation under §11(a) of the Clayton Act, 15 U.S.C. §21(a), to enforce §7 of that Act, as well as a responsibility to advance the National Transportation Policy, did not control the decision in the *Denver case*". (411 U.S. at 761-2)

If the ICC had the power to disapprove acquisitions by virtue of §7 of the Clayton Act or to confer antitrust immunity by virtue of §5(12) [formerly §5(11)] of the Interstate Commerce Act, it certainly had the lesser power—exercised here—to condition its approvals by forbidding subsequent predatory conduct made possible by the previous acquisitions. It does not matter for tolling purposes whether the ICC was preventing violations of the Clayton Act or the Sherman Act when it ordered Greyhound to cease and desist its predatory behavior. Both are antitrust laws, within §16(i), and government proceedings to prevent violations of either toll the statute.

"instituted" by means of intervention in a pending ICC case.[4]

The lower courts' interpretation of §16(i) also effectuates congressional purpose as recognized by this Court in *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311 (1965), whereas a contrary interpretation would defeat it. The question decided in *Minnesota Mining* was whether FTC proceedings tolled the statute. It was held they did. Finding little help in the legislative history of §16(i), the Court declared:

> "It is in light of this legislative silence that we must determine whether §4B is tolled by Commission proceedings. In resolving this question we must necessarily rely on *the one element of congressional intention which is plain on the record—the clearly expressed desire that private parties be permitted the benefits of prior government actions.*" (emphasis added) (381 U.S. at 320)

Defendant in *Minnesota Mining* sought and Greyhound here seeks to circumvent that congressional policy with essentially the same claim. Defendant in *Minnesota Mining* contended that §16(i) was not applicable because FTC proceedings, unlike Justice Department proceedings, are not "instituted by the United States". But the Court held "acceptance of petitioner's position would make enjoyment

[4]Greyhound contends that because the Justice Department's petition to intervene was filed on December 14, 1964 and the petition was granted on May 27, 1965, the government's intervention was untimely. For statute of limitation purposes, intervention must be deemed to occur on the date the petition is filed and not the date it is granted. *See, American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 561 (1974); *Bantolina v. Aloha Motors*, 75 F.R.D. 26, 33-34 (D.Ha., 1977); *Braxton v. Virginia Folding Box Co.*, 72 F.R.D. 124, 126 (E.D.Va., 1976); *S.E.C. v. Keller Bros. Securities*, 30 F.R.D 532, 533 (D.Mass., 1962).

of these intended benefits turn on the arbitrary allocation of enforcement responsibility between the Department and the Commission, and we must therefore reject it". (381 U.S. at 320)

Greyhound makes the same "arbitrary" claim here. If the Justice Department had filed its petition first and Mt. Hood had intervened promptly thereafter—instead of the reverse—there would be no question about the applicability of §16(i). Just as this Court properly held §16(i)'s availability should not depend upon the "arbitrary allocation of enforcement responsibility" between governmental agencies, the Court of Appeals properly held—in reliance upon *Minnesota Mining*—that it should not depend upon who reaches the ICC first.[5] Greyhound's contrary interpretation of §16(i) "would make form controlling" (A. 133) and is the kind of "grudging interpretation" which "would collide head-on with Congress' basic policy objectives". (381 U.S. at 320)

Greyhound's construction would not only defeat the congressional policy of the tolling statute, it would also make a mockery of the policy behind the limitations statute and would frustrate this Court's regard for judicial economy. Shortly after Greyhound terminated the joint through bus arrangement and severed connections with Mt. Hood's service, Mt. Hood proceeded to the ICC to

[5]In this respect, the present case is stronger than *Minnesota Mining* for it was the Justice Department that initiated action "by the United States" through intervention in the ICC case. Referring to the proceedings instituted by the FTC in *Minnesota Mining*, Justice Black (dissenting) observed that "it is not at all clear that this is a suit 'instituted by the United States'. The *Department of Justice* brings suits and criminal prosecutions in the name of the United States, while an independent regulatory agency sues and is sued in its own name". (emphasis added) (381 U.S. at 326, n. 2.)

seek injunctive relief in an effort to save its business from destruction. In seeking injunctive relief from the only forum available to it,[6] Mt. Hood acted with diligence. Just over 60 days later, the Government intervened. If the Government had chosen instead to commence a separate District Court action for injunctive relief against Greyhound's antitrust violations, it is beyond doubt the statute would have been tolled by §16(i). But it is equally plain that such a government-instituted court action, to enjoin the same predatory conduct which Mt. Hood's previously commenced ICC action sought to enjoin, would have been dismissed or stayed to prevent a conflict between court and agency, *Far East Conference v. United States*, 342 U.S. 570 (1952); *United States Navigation Co. v. Cunard S. S. Co.*, 284 U.S. 473 (1932), and the Justice Department would have been remanded to the ICC where the issues were already being addressed.[7]

The government therefore entered a pending ICC case, plainly and necessarily the "functional equivalent" of a District Court action to achieve the same result. It was Mt. Hood's prompt commencement of an ICC action which rendered the government's intervention in that ICC action more appropriate than commencement of a separate court action. To deny tolling under those circumstances would be to invoke the limitations bar against Mt. Hood because

[6]15 U.S.C. §26.

[7]Cf. *Marine Engineers Beneficial Association v. Interlake Steamship Co.*, 370 U.S. 173, 185 (1962); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 392 (1973) (Stewart, J., dissenting): "Otter Tail's refusal to wholesale or wheel power . . . was the subject of two concurrent proceedings—one in the District Court, and another in the Federal Power Commission. It seems to me that the principles of *Ricci* . . . should require a District Court in a case like this one to defer to the Commission proceeding then in progress."

Mt. Hood was diligent. As the Court aptly declared in *Burnett v. New York Central Railroad Co.*, 380 U.S. 424, 428 (1965), the limitations statute's "policy of repose is frequently outweighed . . . where the interests of justice require vindication of plaintiff's rights." This was such a case.

C. Mt. Hood's Damage Action Was Based Upon Matters "Complained Of" In The ICC Proceeding

The Court of Appeals recognized that Mt. Hood's damage action was "based in whole or in part on . . . matters complained of in said [ICC] proceeding." (A. 111, 114, 131) Greyhound asserts the Justice Department petition had not "complained of" that conduct which was the subject of both the ICC proceeding and Mt. Hood's subsequent damage action. The Justice Department petition standing alone "complained of" the conduct alleged by Mt. Hood and asked that, if those charges are proven, Greyhound's conduct be enjoined. In prosecuting the ICC action with Mt. Hood, in seeking ICC cease and desist orders and a District Court injunction and in subsequently enforcing those ICC and court orders by prosecuting contempt petitions against Greyhound, the Justice Department plainly complained of that conduct which constitutes the gravamen of Mt. Hood's damage action. To assert the government did not complain of conduct which it strove to have enjoined offends common sense.

By focusing upon the government's petition to intervene, Greyhound disregards what the statute plainly says —tolling applies with respect to every court action that is based upon any matter "complained of" by the government "*in said proceeding.*" Thus the inquiry is not limited

to the petition itself—though the petition obviously complained about Greyhound's conduct—but necessarily includes the entire "proceeding" to which the government was a party. To assert otherwise is to give §16(i) the kind of "grudging interpretation" which this Court disapproved in *Leh v. General Petroleum Corp.*, 382 U.S. 54 (1965) and *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971). The Court in *Leh, supra,* held that "effect must be given to the broad terms of the statute" (382 U.S. at 59) and, as a consequence, rejected defendant's contention that a "private claimant may invoke §16 (i) only if the conspiracy of which he complains has the same breadth and scope" as that alleged in the prior government action. (382 U.S. at 63) Defendant in *Zenith, supra,* argued that since it was not even mentioned in the Government complaint as a defendant or an unindicted co-conspirator, the private suit against it was not based upon any matter "complained of" in the prior government action. But the Court did not look to the pleadings alone. It held that if the Government "complains" only against certain defendants but "*alleges and proves during trial* that others were conspirators, the fact of the tolling of the statute against those so *proved but not sued* can hardly be denied". (emphasis added) (401 U.S. at 335) This construction, declared the Court, "materially furthers congressional policy by permitting private litigants to await the outcome of Government suits and use the benefits therefrom". (401 U.S. at 336)

D. Greyhound's Remaining Arguments Lack Merit

The Court of Appeals held that since the ICC proceedings "were of a kind likely to produce benefits to Mt.

Hood as a plaintiff in a subsequent antitrust suit" (A. 133), the statute of limitations was properly tolled to effectuate congressional purpose as defined by the Court in *Minnesota Mining*. Greyhound disagrees with the Court of Appeals' decision because, it asserts, Mt. Hood did not derive any benefits from the government's participation in the ICC case. That Mt. Hood was likely to benefit from the government's efforts was plain. Those benefits were recognized by the Court of Appeals and included the government's "investigative and legal resources" which were "made available to fully develop the facts and the law favorable to the common position of the Government and Mt. Hood." (A. 133)

But that was not all. It was the government that obtained a permanent injunction for Mt. Hood *(Greyhound Lines, Inc. v. United States,* 308 F.Supp. 1034 (N.D. Ill. 1970)) and its subsequent enforcement *(United States v. The Greyhound Corp.*, 363 F.Supp. 525 (N.D. Ill. 1973), *aff'd* 508 F.2d 529 (7th Cir. 1974))—thereby ensuring Mt. Hood's survival—and it was the government that helped Mt. Hood prove Greyhound's predatory behavior and thereby negate Greyhound's subsequent claim of antitrust immunity. The Court of Appeals recognized the importance of that benefit: "The successful resolution of these issues was critical to the defeat of Greyhound's claim of antitrust immunity." (A. 133) Those benefits were not of less importance to Mt. Hood merely because Mt. Hood and the government worked together to achieve them.[8]

[8]Greyhound's reliance upon a statement made by Mt. Hood's expert witness at the hearing on attorneys' fees is inapposite. Prior to trial, Mt. Hood sought by motion to have Greyhound collaterally estopped to relitigate the ICC's adverse findings. That motion was denied. Hence it was necessary to prove much of Greyhound's predatory conduct twice (once to the ICC and again to the jury). While that fact (that Mt. Hood had to prove Greyhound's conduct again) was relevant to the award of attorneys' fees, it should not determine whether congressional intent behind §16(i) would be served by tolling in this instance. Indeed, *Minnesota Mining, supra,* holds that §16(i) applies even though plaintiff does not get the "benefit" of collateral estoppel with respect to facts proven in the agency proceeding under §16(a) because the policies of §16(a) and §16(i) are different. Moreover, Greyhound contended to the trial court—in contrast to its contention here—that the government's participation ***"must have played a large part in bringing about a decision favorable to plaintiff."*** (R. 3233)

Greyhound contends that, in seeking to satisfy the congressional antitrust policy behind §16(i), the Court of Appeals' decision failed to satisfy the "congressional purpose of certainty and predictability" reflected in the 1955 amendment to the Clayton Act. But there is nothing about the lower court's decision that is uncertain or unpredictable or antithetical to congressional purpose. Adhering strictly to the "basic principles for the construction of [§16(i)]," *Leh v. General Petroleum Corp.*, 382 U.S. 54, 58 (1965), the Court of Appeals held simply this: If any government action is instituted for the purpose of preventing a violation of the antitrust laws, whether by intervention or joinder as a party to a pending court or agency proceeding or by commencement of a separate court or agency proceeding, the statute of limitations shall be tolled under §16(i) with respect to any claim that is based in whole or in part on any matter complained of in said proceeding. No antitrust plaintiff or defendant will have trouble understanding what the Court of Appeals held, just as no antitrust plaintiff or defendant should have trouble understanding the decisions in *Minnesota Mining, Leh* and *Zenith,* which the lower court followed.

Greyhound's reliance upon the 1955 amendment, if anything, proves too much. Insofar as Congress was concerned with "certainty and predictability," dealt with it by enacting a uniform statute of limitations. However, it left the tolling provision intact. If Congress thought it necessary to the achievement of even greater "certainty and predictability," it could have easily repealed or constricted §16(i). It could do so now. But Greyhound should not ask this Court to do that which Congress has not yet chosen to do. Congress obviously concluded that enactment of a uniform statute of limitations, without more, would fully satisfy the need for certainty.[9] Accordingly, this Court has in all decisions subsequent to the 1955 amendment followed "Congress' basic policy objectives" in enacting §16(i). *Minnesota Mining, supra* at 320.

Greyhound closes with its alarmist "floodgates" claim, i.e., that the Court of Appeals' decision will preserve "countless stale antitrust claims" which "everyone believed" were time-barred. What "everyone believed" is of course unknown but, most certainly, no floodgates will be thrown open by the Court of Appeals' decision. The lower court merely held that when the United States joins as a party to a pending ICC action for the avowed purpose of preventing antitrust violations, §16(i) is invoked. The facts of this case are *sui generis:* whether the statute might also be tolled whenever the Justice Department informally "participates" in other regulatory proceedings to "express its views" on various matters was not decided below and is not presented here.

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[9]See, 101 Cong.Rec. 5131 (1955) (remarks of Reps. Murray and Quigley), noted in *American Pipe and Construction Co. v. Utah*, 414 U.S. 538, 557, n. 29 (1974).

The "ramifications" which Greyhound finds "alarming" are really just this: no more antitrust claims will be preserved by government intervention in a pending ICC case than would be preserved if the antitrust victim and the government, instead of jointly invoking the agency's primary jurisdiction as they did here, were to commence separate court actions that would clearly toll the statute but would also probably be stayed or dismissed under *Far East Conference v. United States,* 342 U.S. 570 (1952) and *United States Navigation Co. v. Cunard Steamship Co.,* 284 U.S. 473 (1932). It is not the Court of Appeals' decision but Greyhound's contention (were it accepted) that could stimulate more litigation, for denial of tolling would necessitate duplicative filings with both agency and court solely as a technical means of preserving antitrust claims against forfeiture.[10]

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[10]See *Crown Coat Front Co. v. United States,* 386 U.S. 503, 515 (1967), wherein the Court (tolling a limitations statute) disapproved such duplicative filings because "the protective suit would be a sheer formality in any event—a procedural trap for the unwary and an additional complication for those who manage the dockets of the courts." Chief Justice Burger, in *Rosado v. Wyman,* 397 U.S. 397, 435 (1970) (dissenting) expressed his concern about the needless proliferation of lawsuits that results from duplicative filings before court and agency: "Finally, there is the very important consideration of judicial economy and the prevention of premature and unnecessary lawsuits, particularly at this time when the courts are overrun with litigants on every subject. If courts are permitted to consider the identical questions pending before [the agency] for its determination, inevitably they will hand down a large number of decisions that could have been mooted if only they had postponed deciding the issues until the administrative proceedings were completed."

II. THE EQUITABLE DOCTRINE OF TOLLING PROVIDES INDEPENDENT GROUNDS FOR AFFIRMANCE OF THE COURT OF APPEALS' DECISION

Immediately after Greyhound cancelled the joint through bus and broke connections with Mt. Hood's service, Mt. Hood commenced its ICC action for the purpose of preventing Greyhound from continuing practices which threatened the destruction of its business. Mt. Hood had no choice of forum. It had to go to the ICC (1) to obtain prospective relief which the ICC could grant by virtue of 15 U.S.C. §21 and 49 U.S.C. §5(10) but which a District Court could not grant by virtue of 15 U.S.C. §26 and (2) to obtain a preliminary determination from the ICC that Greyhound's conduct had not been approved and was not "necessary" to "hold, maintain and operate" its acquired carriers under §5(12) of the Interstate Commerce Act and was therefore subject to the antitrust laws. The ICC disapproved and enjoined Greyhound's predatory conduct as beyond its prior acquisition orders, contrary to numerous sworn representations previously made by Greyhound to obtain the ICC's approval, destructive of competition and contrary to the public interest. The Commission's first decision was rendered April 5, 1968. *Mt. Hood Stages, Inc.*, 104 MCC 449 (1968). Promptly thereafter, on July 5, 1968, Mt. Hood filed this action for damages. These facts provide additional support for the Court of Appeals' affirmance of the District Court's decision with respect to tolling.

Even if the United States had not intervened in Mt. Hood's ICC action on December 14, 1964, for the purpose of enforcing the antitrust laws so as to invoke §16(i), the statute of limitations was tolled when Mt. Hood filed its

petition with the ICC on October 7, 1964. Although the statute of limitations reflects a policy of repose, this policy is "frequently outweighed . . . where the interests of justice require vindication of the plaintiff's rights." *Burnett v. New York Central R. R. Co.*, 380 U.S. 424, 428 (1965). Tolling is an equitable doctrine, *Honda v. Clark*, 383 U.S. 484, 501 (1964), to be applied whenever necessary to prevent injustice. *Burnett, supra*, 380 U.S. at 428. This is such a case.

The decisions of this Court in *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342 (1944); *Burnett v. New York Central Railroad Co.*, 380 U.S. 424 (1965); *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974) and *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975) declare that a statute of limitations may be tolled if important federal policies will be served without doing violence to the statute of limitations' policy of repose. Thus in *Telegraphers* the Court held that prior resort to a regulatory agency suspended the statute of limitations with respect to a subsequent court action because "[r]egrettable as the long delay has been, it has been caused by the exigencies of the contest, not by the neglect to proceed." (321 U.S. at 549) In *Burnett* a prior state court action that was dismissed for improper venue tolled the statute on a later federal claim because plaintiff had acted diligently (albeit mistakenly), defendant was given adequate notice of plaintiff's claim and tolling effectuated congressional purpose. In *American Pipe* an improper class action tolled the statute for all purported class members because tolling promoted the federal policy of "litigative

efficiency and economy" without frustrating the limitation statute's policy of repose. (414 U.S. at 556) While the statute was not tolled in *Johnson,* the Court explained that a statute is tolled if there is a "substantial body of relevant procedural law to guide the decision" and a "significant underlying federal policy that would have conflicted with a decision not to suspend" the statute.[11]

This basic principle of equitable tolling applies here. In deciding whether a statute of limitations should be tolled, the Court declared in *Burnett* that consideration must be given to "the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of the rights given by the Act." (380 U.S. at 427) It was precisely because of the "remedial scheme developed for the enforcement" of the antitrust laws against regulated carriers such as Greyhound that Mt. Hood's preliminary resort to the ICC was (1) essential to prevent the destruction of Mt. Hood's business by Greyhound and (2) a condition precedent to the maintenance of Mt. Hood's subsequent damage action in the trial court below.

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[11]Each of the factors which rendered *Burnett* and *American Pipe* inapplicable in *Johnson* render those cases applicable here: (1) *Johnson* did not involve a federal statute of limitations whereas Clayton Act §4B is involved here; (2) there was "no relevant body of federal procedural law to guide our decision" and there was "no conflicting federal policy to protect" in *Johnson.* As discussed *post,* important federal policies—substantive and procedural—were served by preserving Mt. Hood's damage claim; and (3) unlike *Johnson,* the same "allegations" and same "conduct" and same "issues" were presented to both the ICC and the District Court. (A. 111, 114, 133) Hence "the prior filing . . . operated to avoid the evil against which the statute of limitations was designed to protect." (421 U.S. at 467)

A. 15 U.S.C. §15 and §26 Constitute Part Of The "Remedial Scheme Developed For The Enforcement" Of The Antitrust Laws

Preservation of competition against predatory behavior of the kind proven here is a matter of compelling public interest and antitrust enforcement through private actions for injunctive relief and damages is an important means of achieving that end. Despite the congressional purpose expressed in 15 U.S.C. §26 to encourage private enforcement of the antitrust laws by allowing antitrust victims to obtain injunctive relief against predatory behavior, *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 131 (1969); *Vendo Co. v. Lektro-Vend Corp.,* ____ U.S. ____, 53 L.Ed.2d 1009 (1977), this remedy was unavailable to Mt. Hood. Section 26 prohibits an antitrust victim from obtaining such relief from a District Court against a carrier subject to the Interstate Commerce Act with respect to conduct that is subject to regulation by the ICC. The congressional purpose behind this restriction was stated by the Court in *Central Transfer Co. v. Terminal R. Assoc.,* 288 U.S. 469, 475 (1933): "Its obvious purpose is to preclude any interference by injunction with any business or transactions of interstate carriers of sufficient public significance and importance to be within the jurisdiction of the Commission."

With the District Court's doors closed to Mt. Hood's prayer for injunctive relief, Mt. Hood had no choice but to seek the relief it needed from the ICC—and it promptly did so. Section 26 thus reflects not only a policy in favor of private enforcement of the antitrust laws but also provides a "remedial scheme developed for the enforcement of rights" under those laws against carriers subject to regulation by the ICC. Pursuant to that "remedial scheme",

the victim seeking to prevent antitrust violations must resort to the ICC "to preclude any interference" with the ICC's regulatory jurisdiction by the District Court. Mt. Hood heeded that "remedial scheme"; it would frustrate the congressional policies behind 15 U.S.C. §26 to declare a forfeiture of Mt. Hood's damage claim for having done so.

In 15 U.S.C. §15, Congress has expressed its belief that private damage actions also constitute an important part of the "remedial scheme developed for the enforcement of" the antitrust laws. This Court has frequently recognized that "treble damages . . . play an important role in penalizing wrongdoers and deterring wrongdoing," *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485 (1977); See also *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972); *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 319 (1965) and that, consequently, the antitrust claimant's task should not be rendered unduly burdensome. *Radovich v. National Football League*, 352 U.S. 445, 454 (1957). Equitable tolling will serve that congressional intent, particularly in light of the important role that Mt. Hood's damage action played in complementing the injunctive remedy to achieve compliance with the antitrust laws. Circuit Judge Goodwin (sitting as trial judge by designation) observed:

> "In the first place, the litigation before the Commission has proceeded for approximately a decade with no apparent impact upon Greyhound's conduct. If Congress intended the Interstate Commerce Act to provide a remedy for competitors injured by predatory behavior on the part of regulated carriers, then the legislation is woefully inefficient. Second, if proof outside the abundant proof in this record were needed, the collateral [ICC] cases strip away any pretense that Greyhound's conduct toward its competitors was simply the result of good-faith aggressive management. The costs to Greyhound of the prolonged litigation before the Commission apparently have been more than offset by the profits Greyhound has derived by flouting the Commission's cease-and-desist orders. If there was ever a case in which a private action for damages is demonstrably necessary to carry out national antitrust policy, this is it." (A. 89)

B. The Doctrine Of Primary Jurisdiction Constitutes Part Of The "Remedial Scheme" Developed To Accommodate The Interstate Commerce Act And The Antitrust Laws

Equitable tolling here is essential not only to "the remedial scheme" reflected in 15 U.S.C. §15 and §26 but also to the remedial scheme developed by this Court to avoid conflict between antitrust and regulatory standards—the doctrine of primary jurisdiction. That doctrine virtually mandated Mt. Hood's course of action. Mt. Hood had already—of necessity—resorted to the ICC for prospective relief. Once Mt. Hood had invoked the ICC's jurisdiction regarding Greyhound's destructive practices, it is virtually certain that a simultaneous court action concerning the same conduct would have been dismissed or stayed.

Mt. Hood acted in accordance with the doctrine of primary jurisdiction. That doctrine has been developed by this Court and lower federal courts to accommodate the exercise of the courts' general powers to the special powers granted by Congress to certain agencies. One of the main purposes of this doctrine is to allow the agency responsible

for administering a regulatory scheme to adjudicate particular matters under its regulatory standards and thereby avoid needless conflict between different statutes and the tribunals which administer them. The Court in *Marine Terminal v. Rederi Transatlantic*, 400 U.S. 62, 68 (1970) declared that it had

> "recognized early in the development of administrative agencies that coordination between traditional judicial machinery and these agencies was necessary if consistent and coherent policies were to emerge. . . . The doctrine of primary jurisdiction has become one of the key judicial switches through which this current has passed."

The doctrine of primary jurisdiction thus responds to legislative intent.[12] It serves as a means of timing the adjudication of cases in the courts so as to allow regulatory commissions to fulfill the role Congress designed for them. Mt. Hood acted in accordance with that doctrine; it would be inequitable to declare a forfeiture of its damage claim for having done so. Only by tolling the statute can this Court avoid such an unfair result. Confronted by a wall of precedent regarding primary jurisdiction, Mt. Hood had every reason to conclude that a District Court

[12]*See, United States Navigation Co. v. Cunard Steamship Co.*, 284 U.S. 474, 482-3 (1932): "The accomplishment of the purpose of Congress could not be had without the comprehensive study of an expert body employed in administrative supervision." Indeed, it has been described as reflective of legislative intent by reason of Congress' tacit approval over the years. See Latta, *Primary Jurisdiction In Regulated Industries And The Antitrust Laws*, 30 Univ. of Cinn. L. Rev. 261, 287 (1961).

would have dismissed a simultaneous damage action in 1964 as premature so as to avoid a conflict with the ICC.[13]

In the face of Greyhound's persistent claims of antitrust immunity, the doctrine of primary jurisdiction applied with particular force here. The Court of Appeals recognized that the ICC's preliminary review of Greyhound's conduct proved essential to the establishment of Mt. Hood's later antitrust claim: "The successful resolution of these issues was critical to the defeat of Greyhound's claim of antitrust immunity." (A. 133) While *Ricci*

[13]This important federal doctrine has been invoked to dismiss or stay countless federal court actions pending referral to the agency charged with the primary responsibility for regulating the alleged conduct so as to coordinate the work of agency and court and accommodate the regulatory schemes which each administers. Those cases are too numerous to list here. For the Court's reference, Mt. Hood has set forth the principal decisions on primary jurisdiction in the Appendix. See especially, *United States Navigation Co. v. Cunard Steamship Co.*, 284 U.S. 474, 481 (1932) ["a remedy *must* be sought from the commission *before* the jurisdiction of the courts could be invoked."]; *Far East Conference v. United States*, 342 U.S. 570, 574 (1952) [agency had "exclusive preliminary jurisdiction" of the matters plaintiff alleged]; *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 220 (1966) [" the danger of . . . conflict could best be avoided by holding that one tribunal or the other has the *exclusive* right to make the initial factual determination".] (emphasis added) It is no answer for Greyhound to speculate that a court might have merely stayed rather than dismissed a simultaneous court action. When forced to go to the ICC 14 years ago to save its business from destruction by Greyhound, Mt. Hood had every reason to believe from the 60 years of precedent on primary jurisdiction that a simultaneous court action would have been dismissed as premature. Indeed in 1964 (when Mt. Hood had to act), the law of the Ninth Circuit mandated dismissal. Relying upon *Far East* and *Cunard*, the Court of Appeals for the Ninth Circuit in *Carnation Co. v. Pacific Westbound Conference*, 336 F.2d 650, 663 (9th Cir. 1964) affirmed dismissal of plaintiff's antitrust case on similar facts and held the District Court "was without jurisdiction to proceed." Mt. Hood had every reason to believe that was governing law.

v. Chicago Mercantile Exchange, 409 U.S. 289 (1973) did not involve a statutory antitrust exemption, the Court declared that prior resort to the agency "would be of great help to the antitrust court in arriving at the essential accommodation between the antitrust and the regulatory regime." (409 U.S. at 307) Even the dissent, believing primary jurisdiction inapplicable because the agency could not confer immunity, recognized: "If the commission has been given the power to grant general immunity to antitrust violators, sound judicial administration would require consultation with it before proceeding with the antitrust suit." (409 U.S. at 313) Although holding a stay of the court action inappropriate in *Nader v. Allegheny Airlines*, 426 U.S. 290 (1976), this Court indicated the result would be different if—as here—the defendant were asserting a statutory exemption. Referring to *United States Navigation Co. v. Cunard Steamship Co.*, 284 U.S. 474 (1932), *Nader* declared: ". . . this court dismissed an antitrust action because initial consideration by the agency had not been sought." (426 U.S. at 301) *See also, FMC v. Pacific Maritime Association*, ... U.S. ....., 46 U.S.L.W. 4169, 4172 (1978).

The doctrine of primary jurisdiction thus manifests a "positive preference" for preliminary resort to the ICC, a "preference" which this Court found absent in *Johnson v. Railway Express Agency*, 421 U.S. 454, 461 (1975). Preliminary consideration of antitrust issues by the agency charged with supervising the antitrust defendant's conduct is favored, since it "serves the important function of establishing a first line of defense against those competitive practices that might later be the subject of antitrust pro-

ceedings". *Gulf States Utilities Co. v. F.P.C.*, 411 U.S. 747 (1973). Tolling here will accomodate that preference.

C. The Statute Of Limitations' Policy Has Been Satisfied

Finally, the statute of limitations' policy of repose has been met. Mt. Hood has neither slumbered on its rights nor surprised Greyhound with stale claims. See, *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348-9 (1943). Greyhound received ample notice of Mt. Hood's charge that Greyhound was engaged in predatory conduct which violated the antitrust laws. The Court of Appeals observed that Mt. Hood's "allegations" and Greyhound's "conduct" and the "issues" with respect thereto were all essentially the same in both proceedings (A. 111, 114, 133) and that "Antitrust issues were an appropriate part of the [ICC] proceedings." (A. 136) Greyhound acknowledged that "in its petition [to the ICC], plaintiff alleged substantially everything which is alleged in its complaint in this Court" (R. 94) and, further, that "the Justice Department intervened in the proceeding to assure the adequate consideration of antitrust issues." (R. 1374) The ICC also told Greyhound that it was applying the antitrust laws to Greyhound's conduct. (A. 136) Hence it is plain that the ICC action for injunctive relief and the later court action for damages were legally and factually similar enough "to avoid the evil against which the statute of limitations was designed to protect." *Johnson v. Railway Express Agency*, 421 U.S. 454, 467 (1975). *See also, Elkins v. Derby*, 12 Cal.3d 410, 417-8 (1974).

Nor did Mt. Hood lack diligence. Ninety days after Greyhound severed connections with Mt. Hood's service,

Mt. Hood went to the ICC for injunctive relief. Ninety days after the ICC rendered its first decision, Mt. Hood went to the federal court for restitution. Mt. Hood has been vigorously prosecuting both actions, in search of assistance from both forums, for the past fourteen years.

Certainly Mt. Hood acted no less reasonably than did plaintiff in *Burnett* or *American Pipe* or *Telegraphers* or *Zenith* or *Leh.* The statute was tolled in those cases for plaintiffs who either had committed some procedural error, such as filing in the wrong court or relying upon an improper class action, or who were passively awaiting the outcome of related government litigation. In contrast, Mt. Hood not only proceeded with diligence but also proceeded in accordance with the remedial scheme reflected in the Clayton Act and the federal doctrine of primary jurisdiction and in deference to this Court's rightful concern for judicial economy and orderly procedure. What the Court declared in *Burnett, supra,* 580 U.S. at 435, applies with equal force here: "Congress would not wish a plaintiff deprived of his rights when no policy underlying a statute of limitations is served in doing so."

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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March 23, 1978.

(Appendices A and B Follow)

APPENDICES

Appendix A

STATUTES INVOLVED

Section 4 of the Clayton Act (15 U.S.C. §15):

That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 11(a) of the Clayton Act (15 U.S.C. §21(a)):

Authority to enforce compliance with sections 13, 14, 18, and 19 of this title by the persons respectively subject thereto is vested in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communciations Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows: . . .

Section 16 of the Clayton Act (15 U.S.C. §26):

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any

court of the United States having jurisdiction over the parties, as against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven, and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

Section 5(10) of the Interstate Commerce Act (49 U.S.C. §5(10)):

The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1), (2), or (8), of this section, as it may deem necessary or appropriate.

Appendix B

PRINCIPAL DECISIONS OF THE SUPREME COURT WHEREIN A DISTRICT COURT ACTION WAS DISMISSED OR STAYED BECAUSE OF THE DOCTRINE OF PRIMARY JURISDICTION

Texas & Pacific Railway Company v. Abilene Cotton Oil Company, 204 U.S. 426 (1907);

Morrisdale Coal Co. v. Pennsylvania Railroad Co., 230 U.S. 304 (1912);

Mitchell Coal & Coke Company v. Pennsylvania Railroad Company, 230 U.S. 247 (1913);

Texas & Pacific Railway Company v. American Tie & Timber Company, 234 U.S. 138 (1914);

Northern Pacific Railway Company v. Solum, 247 U.S. 477 (1917);

Great Northern Railway Co. v. Merchants Elevator Co., 259 U.S. 285 (1922);

Keogh v. Chicago & Northwestern Railway Company, 260 U.S. 155 (1922);

United States Navigation Company v. Cunard Steamship Company, 284 U.S. 473 (1932);

St. Louis, Brownsville & Mexico Railway Company et al., v. Brownsville Navigation District, 304 U.S. 295 (1937);

General American Tank Car Corporation v. El Dorado Terminal Company, 308 U.S. 422 (1940);

Armour & Company v. Alton Railroad Company, 312 U.S. 195 (1941);

Slocum v. Delaware, L. & W. R. Co., 339 U.S. 239 (1949);

Montana-Dakota Utilities Co. v. Northwestern Public Service Company, 341 U.S. 246 (1951);

Far East Conference v. United States, 342 U.S. 570 (1952);

United States v. Western Pacific Railroad Company, 352 U.S. 59 (1956);

Federal Maritime Board v. Isbrandtsen Company, 356 U.S. 481 (1958);

Southwestern Sugar & Molasses Co. v. River Terminals Corporation, 360 U.S. 411 (1959);

Pennsylvania Railroad Company v. United States, 363 U.S. 202 (1960);

Marine Engineers Beneficial Association v. Interlake Steamship Company, 370 U.S. 173 (1962);

Hewitt-Robins, Inc. v. Eastern Freight-Ways, Inc., 371 U.S. 84 (1962);

Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1962);

Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1963);

Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213 (1966);

Interstate Commerce Commission v. Atlantic Coast Line R. Co., 383 U.S. 576 (1966);

Port of Boston Marine Terminal Association v. Rederiaktiebolaget Transatlantic, 400 U.S. 62 (1970);

Federal Power Commission v. Louisiana Power & Light Company, 406 U.S. 621 (1972);

Ricci v. Chicago Mercantile Exchange, 409 U.S. 289, reh. den. 410 U.S. 960 (1973).

United States v. Michigan National Corp., 419 U.S. 1 (1974).

FOR ARGUMENT

Supreme Court, U. S.
FILED
APR 14 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-598

THE GREYHOUND CORPORATION AND GREYHOUND LINES, INC.,
Petitioners,

vs.

MT. HOOD STAGES, INC.,
doing business as PACIFIC TRAILWAYS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioners' Reply Brief on the Merits

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INTRODUCTION

Greyhound's opening brief demonstrated that 15 U.S.C. § 16(i) cannot and should not be read to toll the statute of limitations in this action. Mt. Hood's arguments to the contrary ignore the plain language and purpose of the statute, the facts and the applicable principles of law.

Mt. Hood's alternative "equitable tolling" argument makes even less sense, for it stands the concepts of fairness and equity on their heads. It would abrogate the antitrust statute of limitations and confer an undeserved windfall on a plainly dilatory plaintiff.

ARGUMENT

I. The Statute of Limitations Was Not Tolled by 15 U.S.C. § 16(i).

A. THE COURT OF APPEALS' DECISION IS CONTRARY TO 15 U.S.C. § 16(i).

Section 16(i) does not apply to this action, first, because the ICC modification case was "instituted" by Mt. Hood, not the United States. (O.B. 8-9) Mt. Hood does not and cannot dispute that that statutory requirement has not been met.[1] Instead it argues that Congress' clear language should be disregarded because to give it effect would be to adopt a "grudging interpretation" of the statute. (R.B. 14) To support that argument it says that *if* the United States had filed a complaint in district court charging Greyhound with antitrust violations and seeking injunctive relief against it, then Section 16(i) would have applied. (R.B. 15) That statement is certainly true, but just as certainly it is irrelevant. The United States not only did not file such a complaint, it could not have done so. The government had "no way of knowing" the facts (A. 37), and therefore it could not in good faith have made the charging allegations necessary to institute an action.[2] For the same reason, the government neither did nor could have charged Greyhound with any wrongdoing before the ICC, and therefore it neither did nor could have instituted that proceeding either. Thus, the question is not simply one of form—who got to the ICC first; it is one of substance—who had investigated the facts enabling it to make charging allegations and seek relief and thereby to "institute" proceedings. Mt. Hood, not the government, was that party. Therefore, even if it might be proper in some other case to ignore Section 16(i)'s requirement that the government "institute" the proceeding (rather than intervene in it), it would not be proper to do so here.

1. Mt. Hood does say that before the government intervened there was no government civil proceeding but that there was one after it intervened. (R.B. 12-13) That begs the question and proves nothing.

2. What would a district court do with a "complaint" which sought no relief, made no charges and specifically disclaimed any knowledge of the facts? In the absence of any charge of wrongdoing and any claim for relief it is doubtful that a justiciable case or controversy would be presented. *See, e.g., Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227, 239-41 (1937) (controversy must be "real and substantial . . . admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts."); *United States v. West Virginia,* 295 U.S. 463 (1935).

Second, this action is not based on anything "complained of" by the United States because the United States complained of nothing. (O.B. 9) Mt. Hood says that the petition "standing alone 'complained of'" Greyhound's conduct. (R.B. 16) No fair reading of the petition will support that argument. (A. 36-41) The petition does describe the charges made by Mt. Hood (A. 37), but it is careful not to endorse them or to make any charges of its own. The government took no position at all on the merits of the dispute between Mt. Hood and Greyhound; with no knowledge of the facts, it could not have done so. Mt. Hood also says that the government petition asked that "Greyhound's conduct be enjoined". (R.B. 16) That is simply false; there is not one word in the petition asking for relief of any kind. (A. 36-41)

There being no complaint in the government's petition, Mt. Hood is forced to argue that what the government "complained of" should be judged by what action the government in fact took during the course of the entire proceeding and not by what the petition states, citing *Leh v. General Petroleum Corp.*, 382 U.S. 54 (1965). (R.B. 16-17) But *Leh*, and all the other decisions which have addressed the issue, say

precisely the opposite. 382 U.S. at 65. (O.B. 9)[3] There is good reason for that established rule, and it would be unwise to change it. (*See* pp. 8-9 below).

For purposes of this case, however, it does not matter what rule is applied. Neither of the courts below conducted any review of the administrative proceeding to determine what the government did, said or contended following the filing of its neutral petition, and there is nothing in the record from which such a review could be made. In fact, the only evidence relating to the government's participation in the ICC proceeding comes from Mt. Hood's own expert witness, and he concluded that Mt. Hood received "no benefit from what the Government did." (A. 103)[4] Thus, Mt. Hood's numerous statements to the effect that the government "jointly prosecuted" the ICC case with Mt. Hood (R.B. 4, 6, 16, 18) are imaginary; it cites no record support for them and there is none. Mt. Hood's references to the review proceedings before the three-judge court in Chicago (R.B. 5, 11, 16, 18) do not provide that missing sup-

3. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), also cited by Mt. Hood (R.B. 17), is not to the contrary. Mt. Hood's quotation from this Court's opinion in that case is out of context. The paragraph from which the quotation is taken makes it clear that it does not matter what is proved in a government suit; what matters is the antitrust violation *charged*. 401 U.S. at 335.

4. Mt. Hood implies that Greyhound took an inconsistent position in the District Court (R.B. 19 n.8), but that is not true, and the quotation from Greyhound's memorandum on attorneys' fees is inaccurate. Greyhound argued that the ICC order, which was admitted into evidence, played a large part in plaintiff's success before the jury, but Greyhound did not argue that the government's participation played a part in plaintiff's success before the ICC. (R. 3233) The testimony from Mt. Hood's expert, far from being "inapposite" (R.B. 18-19 n.8), directly related to that issue. Presumably Mt. Hood's purpose in introducing it was to suggest that although Mt. Hood received benefit from the ICC order, that order resulted from the efforts of Mt. Hood, not the government.

port. Those proceedings were instituted by Greyhound *after* the ICC decision and *after* Mt. Hood had filed its complaint in this action, and therefore can have no relevance to the statute of limitations. Moreover, in those proceedings the ICC filed a counterclaim to enforce *its order* (not the antitrust laws). *Greyhound Lines, Inc. v. United States,* 308 F.Supp. 1033, 1034-1035 (N.D. Ill. 1970). The fact that the Justice Department fulfilled its statutory duty to represent the government in such actions, 28 U.S.C. §§ 2321-2323, hardly shows that the United States "complained of" anything during the course of the ICC proceeding leading up to the order being reviewed.

Third, Section 16(i) cannot apply here because the ICC modification proceeding was not a proceeding to "prevent, restrain or punish violations of any of the antitrust laws", regardless of who "instituted" it and regardless of what the government did or did not "complain of". (O.B. 10) Mt. Hood admits that the ICC proceeding was brought under Section 5(10) of the Interstate Commerce Act to enforce that Act by a supplemental order attaching certain conditions to previous ICC Section 5 orders. (R.B. 12 n.3) It argues that Section 16(i) nevertheless applies because the conduct at issue in the ICC proceeding was also in violation of the antitrust laws. (R.B. 8-12) But that determination was made only by the antitrust jury some nine years later. The statute requires that the original proceeding be one to enforce the antitrust laws, which this one was not. Mt. Hood's subsequent civil antitrust litigation did not and could not change the character of the prior, completed ICC proceeding.

Mt. Hood's references to the ICC's power to enforce Section 7 of the Clayton Act (R.B. 11-12) only reinforce the fact that the ICC proceeding involved in this case was

not one in which the ICC did or could enforce the antitrust laws. The ICC did not issue a complaint charging a violation of Section 7. *See* 15 U.S.C. § 21. It heard Mt. Hood's charges under Section 5 of the Interstate Commerce Act, pursuant to which it must consider, but neither enforces nor is bound by, the policies of the antitrust laws. *McLean Trucking Co. v. United States,* 321 U.S. 67, 79, 86 (1944). (O.B. 10)[5] Intervention by the United States did nothing to change the nature of the ICC proceeding. (O.B. 8) The Justice Department itself clearly distinguishes its intervention and participation in regulatory proceedings in which the public interest requires "consideration" of antitrust policies from its activities to enforce the antitrust laws. *Compare* 28 C.F.R. § 0.40, paragraph (b) (1977) (intervention) with *Id.,* paragraph (a) (enforement). *See* Statement of John H. Shenefield, Assistant Attorney General, Antitrust Division, before House Comm. on the Judiciary, March 21, 1978, CCH Trade Reg. Rep. No. 326, Part II, pp. 17-18, 50 (March 27, 1978). Plainly the Justice Department was doing the former and not the latter in this case.

Finally, the government's petition was not granted until May 27, 1965, and, even if all of Greyhound's other arguments are wrong, that is the earliest date on which it

5. None of the cases cited by Mt. Hood on page 11 of its brief is to the contrary. Indeed, *United States v. ICC,* 396 U.S. 491 (1970), states that the "role of antitrust policy under § 5" was "comprehensively and dispositively" treated in *McLean.* 396 U.S. at 511. The quotation from *Denver & R.G.W.R.R. v. United States,* 387 U.S. 485 (1967), is out of context. *Denver* merely holds that the ICC must give consideration to antitrust policies when exercising its power under Section 20a of the Interstate Commerce Act.

Nor can Mt. Hood gain any comfort from those lower court decisions which hold Section 16(i) applicable to FTC proceedings brought to enforce Section 5 of the Federal Trade Commission Act. (R.B. 8) Those cases—even if correctly decided—are easily distinguishable, as Greyhound's opening brief demonstrates. (O.B. 13-14 n.11)

could be said that any Section 16(i) tolling commenced. (O.B. 10-12) Mt. Hood dismisses this point in a footnote, citing cases based on the principle that one who has filed a petition to intervene giving notice of his claim should not be barred if the court does not grant his petition before the statute of limitations runs. (R.B. 13 n.4) But those cases do not address the point. The point is not that the government's petition was "untimely" or that the government should have been barred from participating in the ICC proceeding. The point is that Section 16(i) must be interpreted consistent with its purpose—to provide private litigants with the benefits of the government's antitrust enforcement efforts. (O.B. 11) The government could take no antitrust enforcement efforts in the ICC proceeding until its petition was granted; accordingly, no benefits from any such efforts could have resulted to Mt. Hood until then. The date on which the petition to intervene was filed simply does not bear any logical relationship to the language or purpose of Section 16(i); therefore, it does not bring the statute into operation. *See Dungan v. Morgan Drive-Away, Inc.,* No. 76-2681 (9th Cir. Jan. 13, 1978). (O.B. 11-12; *Id.*; App. B p. 9)[6]

The Court of Appeals' interpretation of Section 16(i) is contrary to the clear language of the statute in every respect.

B. THE COURT OF APPEALS' DECISION IS CONTRARY TO CONGRESS' INTENT AND SOUND POLICY.

Not only is the decision below inconsistent with the clear language of the statute, it is also contrary to Congress' intent. (O.B. 13-17) The purpose of Section 16(i) is to

6. Although *Dungan* is clearly an important decision on the interpretation of Section 16(i), Mt. Hood's brief does not discuss it or even acknowledge its existence.

permit private litigants to ride the coattails of prior government antitrust enforcement efforts—efforts which did not occur here. Surely Congress did not intend Section 16(i) to be used, as it was here, to permit a private litigant to ride its *own* coattails.

Moreover, the Court of Appeals' "functional equivalent" test is bad policy. To make the application of Section 16(i) turn on what transpired during the course of government actions would mean that it might be impossible to tell whether the statute had been tolled until after those actions had finally concluded. It would resurrect the very uncertainty and unpredictability which Congress sought to avoid. It would also require a detailed review of the record of the prior proceedings to determine what had in fact transpired, thereby adding more complexity and new burdens to already overburdened courts and litigants. (O.B. 13-17)

It is no answer to say—as Mt. Hood does—that Congress could have achieved greater certainty and predictability by repealing Section 16(i). (R.B. 20) The question is how to interpret the statute consistent with its language, Congress' purpose and sound policy. Mt. Hood also claims that the decision below does not create uncertainty, but its characterization of the holding is simply a paraphrase of Section 16(i) and does nothing to eliminate the difficulties that decision creates. (R.B. 19) It does not answer the questions of what constitutes "government action" or when it is "for the purpose of preventing a violation of the antitrust laws" or when a matter has been "complained of" in the government action. For example, would the government's participation in *Denver & R.G.W.R.R. v. United States*, 387 U.S. 485 (1967), toll the statute of limitations under the Court of Appeals' opinion? If it would, for what period of time and as to what issues would the statute be

tolled? And how would a district court go about answering these questions?

Under the Court of Appeals' decision in this case, the only way around these problems is to say that the statute is tolled any time the Antitrust Division participates in any regulatory proceeding regardless of what it contends or does in the proceeding.[7] Even Mt. Hood cannot deny that that result would be highly undesirable. (O.B. 17-18) Instead, it suggests that such a result can be avoided because "the facts of this case are *sui generis*". (R.B. 20) But Mt. Hood offers no insight as to how this case, in which the government filed a neutral position to intervene, can be distinguished from the countless other cases in which the government participates in a similar manner.

Rational distinctions concerning the government's participation in regulatory proceedings can be made. For example, it might be appropriate in a given case to apply Section 16(i) where the government's petition to intervene in fact charged a violation of the antitrust laws and in fact demanded relief to prevent, restrain or enjoin that violation. To hold Section 16(i) applicable to this case, however, would preclude that type of distinction from being drawn in the future.[8]

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7. Such participation by the Antitrust Division has been extensive (*see* Petition for Certiorari, App. F) and is likely to continue at a high level. Statement of John H. Shenefield, Assistant Attorney General, Antitrust Division, before House Comm. on the Judiciary, March 21, 1978, CCH Trade Reg. Rep. No. 326, Part II, pp. 17-18, 50 (March 27, 1978).

8. Mt. Hood says that failure to apply Section 16(i) will necessitate duplicative filings (R.B. 21), but that is not so. Mt. Hood chose to attack Greyhound under two different statutes requiring proceedings before two different tribunals, and two proceedings were required regardless of whether the statute was tolled. Moreover, Mt. Hood's pursuit of its ICC claims does not excuse its failure to act diligently with respect to its antitrust claims. *See Johnson v. Rail-*

II. The Statute of Limitations Was Not Tolled by Any Equitable Doctrine.

Although this Court limited its grant of certiorari to the Section 16(i) issue (A. 142), Mt. Hood argues in the alternative that the statutory damage period should be extended from four to twenty years to "prevent injustice." (R.B. 23) Mt. Hood's "equitable tolling" theory should be rejected for several reasons: (1) there isn't a shred of equity in Mt. Hood's position; (2) it is not supported by any known authority and is inconsistent with the Court's decision in *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975); (3) it is inconsistent with Mt. Hood's argument that Congress has specified the extent to which the antitrust statute of limitations may be tolled and, therefore, courts should not meddle (R.B. 20); and (4) it would effectively convert a specific statute of limitations into a vague laches doctrine to be invoked whenever a plaintiff could think up some excuse for failure to file an action within the statutory period.

To put Mt. Hood's argument in perspective it is necessary at the outset to correct the false impressions that appear from reading its brief.

Mt. Hood repeatedly proclaims that in pursuing its claims it was "diligent." (R.B. 15-16, 22, 25, 31-32) That contention is central to its equitable tolling argument because it would hardly be inequitable to apply the normal statutory limitations period to a plaintiff which has not been diligent. But in arguing that it was diligent Mt. Hood is playing with facts of its own invention, not those established by the jury's findings. Mt. Hood filed its ICC pro-

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way Express Agency, Inc., 421 U.S. 454 (1975) (pursuit of Title VII claim does not excuse delay in filing action under 42 U.S.C. § 1981).

ceeding in 1964, which it says was immediately after Greyhound cancelled the joint-through bus (R.B. 22), but the jury found that it knew or should have known of its alleged claims against Greyhound in 1960. (A. 82) To wait four years is not to act with diligence. Moreover, Mt. Hood did not file its complaint here until July 5, 1968, some seven-and-a-half years after it knew of those claims. Mt. Hood says that this was shortly after the ICC's first decision (R.B. 31-32), but fails to point out that the date on which it finally filed its complaint was just *two days* short of four full years from the date Greyhound gave notice of cancellation of the joint-through bus. (A. 46, R. 1; Ex. 359, Tr. 1173) In other words, far from acting with diligence, Mt. Hood could hardly have waited any longer than it did.

Mt. Hood seeks to rationalize its delay by implying that its course of action was compelled because the federal court could not grant injunctive relief, but how does that excuse its delay in filing its claim for damages? And, if Mt. Hood truly relied on its stated inability to obtain an injunction from the federal court, why did it seek such relief when it finally did file its complaint in 1968? (A. 46, 55)

Mt. Hood also suggests its delay is excusable because it consciously chose to proceed as it did in reliance upon and out of respect for the doctrine of primary jurisdiction. (*See, e.g.*, R.B. 22, 27) Of course, Mt. Hood's rationalizations would not excuse its failure to file its complaint even if they were accurate. But they are not accurate; they obviously were thought up by counsel long after the actual events. Thus, contrary to Mt. Hood's statements that it "had no choice of forum" (R.B. 22), that the ICC proceedings were "a condition precedent" to this action (R.B. 24), that "the District Court's doors [were] closed . . ." (R.B. 25) and that its course of action was "virtually mandated"

(R.B. 27), Mt. Hood in fact was free at any time to file its antitrust action and stop the running of the statute. It simply did not do so.

Mt. Hood also states that in 1964 when it "had to act" it was "confronted by a wall of precedent" which gave it "every reason to conclude" that a simultaneous action would have been dismissed, implying that it relied on the Ninth Circuit decision in *Carnation Co. v. Pacific Westbound Conference*, 336 F.2d 650 (9th Cir. 1964). (R.B. 28-29 and n.13) But this Court reversed *Carnation* on the very point on which Mt. Hood supposedly had relied, *Carnation Co. v Pacific Westbound Conference*, 383 U.S. 213, 222-223 (1966), and thus Mt. Hood's argument, which does not even note that reversal, seems contrived. Moreover, even if Mt. Hood had relied on that reversed decision, it would not be fair to impose on Greyhound the costs of its error.[9] In truth Mt. Hood neither considered nor relied upon primary jurisdiction considerations in the timing of the filing of its complaint. Its President, Mr. Niskanen, testified that he did not even consult a lawyer with respect to a private action against Greyhound until 1968, almost four years after the ICC proceedings were commenced and nearly eight years after Mt. Hood knew of its antitrust claims. (Tr. 3774) Thus, Mt. Hood's primary jurisdiction

9. Even if a court had dismissed Mt. Hood's complaint, it is extremely unlikely that it would not have provided some statute of limitations protection. Mt. Hood argues that it is "no answer for Greyhound to speculate" as to what a court might have done (R.B. 29 n.13) but it is Mt. Hood's position, not Greyhound's, which rests on speculation. Mt. Hood could have filed its case and found out what the court would do. It failed even to try.

Nor does Mt. Hood explain why it "had to act" in 1964. It had known of its claims since 1960 (A. 82), and it plainly could have "acted" in 1961, 1962 or 1963. It also could have acted in 1966 or 1967, after this Court reversed the Ninth Circuit decision in *Carnation*.

rationalization for its lack of diligence is purely a lawyer's afterthought, and even its own lawyers did not think of it until after the trial.[10]

Mt. Hood attempts to raise some equity for its position by stating that tolling is required to "preserve" and to avoid a "forfeiture of its damage claim." (R.B. 24 n.11, 26, 28) But there is no threat of any "forfeiture" here. The question is whether Mt. Hood's claim will reflect the normal four-year period Congress has mandated or whether that period will be multiplied five-fold. The jury found that Mt. Hood had suffered actual damages of $4,382,030 over the entire period from 1953 to 1973, with $2,650,491 of the total attributable to the period about which there is no statute of limitations issue. (A. 83) Accordingly, even if Mt. Hood loses on its tolling claims, it still stands to recover $7,951,473, nearly double the amount of its *total* actual losses as found by the jury. To recover double damages is not an "inequity", an "injustice" or a "forfeiture".

Plainly there is no equity in Mt. Hood's position from which to argue that its windfall recovery should be increased. Nor is there any case authority to support that position; in fact it is repudiated by *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975).[11]

In *Johnson*, the Court refused to hold the statute of limitations tolled on petitioner's race discrimination claim

10. The first suggestion of Mt. Hood's "equitable tolling" theory in this case was in its post-trial brief filed September 2, 1973, more than five years after the action was commenced. (R. 2443, 2653-2659)

11. None of the other cases cited by Mt. Hood supports its equitable tolling argument on the facts here:

Burnett v. New York Cent. R.R., 380 U.S. 424 (1965), involved an injured railroad worker, who through ignorance, filed his FELA action in a state court lacking venue. By the time he learned of his error and filed the identical complaint in a proper federal court, the statute of limitations

under 42 U.S.C. § 1981 during the period he was pursuing his EEOC administrative remedies which were a prerequisite to his filing a Title VII case. Both claims were based upon the same facts. The petitioner argued that failure to toll the statute would "conflict seriously with the broad remedial and humane purposes of Title VII" and would "force a plaintiff into premature and expensive litigation that would destroy all chances for administrative conciliation and voluntary compliance." 421 U.S. at 465. In rejecting those arguments, the Court pointed out that plaintiff could have filed his § 1981 suit and asked the court to stay it pending completion of administrative efforts at conciliation and voluntary compliance. The Court then noted the "fundamental answer to petitioner's argument": That petitioner could have filed his § 1981 action at any time after the cause of action accrued. 421 U.S. at 456-466.

had run. Under these circumstances, and in light of Congress' "purposes in enacting this humane and remedial Act," the Court held that plaintiff's filing of his action, albeit in the wrong court, tolled the statute of limitations. 380 U.S. at 427-428. Here, Mt. Hood asserts that its decision to proceed first in the ICC was deliberate, not inadvertent, and it was aware of its right to file its antitrust case at any time to stop the running of the statute.

American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974), simply held that where class action status has been denied solely because of failure to demonstrate the requisite numerosity of members, the commencement of the original class action tolls the statute for those members of the class who make timely motions to intervene after the denial of class action status. 414 U.S. at 552-553.

The issue in *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342 (1944), was whether a state statute of limitations barred an action to enforce an award of the Adjustment Board under the Railway Labor Act where the action was filed within the time specified in the Act for bringing such actions. The Court held that the state statute was not even applicable, and that, in any event, "[a] state statute of limitations can hardly destroy a claim because the period of actual contest over it in a federal tribunal extends beyond the limitation period." 321 U.S. at 348.

The Court then concluded: "We find no policy reason that excuses petitioner's failure to take the minimal steps necessary to preserve each claim independently." 421 U.S. at 466. Each of those points applies with equal or greater force here to compel rejection of Mt. Hood's equitable tolling argument.

Moreover, in *Johnson*, the Court explained that "the tolling effect given to the timely prior filings in *American Pipe* and in *Burnett* depended heavily on the fact that those filings involved exactly the same cause of action subsequently asserted." 421 U.S. at 467. As the Court said:

> "Only where there is complete identity of the causes of action will the protections suggested by petitioner necessarily exist and will the courts have an opportunity to assess the influence of the policy of repose inherent in a limitation period." 421 U.S. at 468, n.14.

Mt. Hood's ICC proceeding for a supplemental order in acquisition proceedings under the Interstate Commerce Act did not assert "exactly the same cause of action subsequently asserted" in this antitrust case; therefore, that ICC proceeding did not give Greyhound the notice to which it was entitled and it could not have "operated to avoid the evil against which the statute of limitations was designed to protect." 421 U.S. at 467.

Mt. Hood's equitable tolling theory is also at odds with the position it took with respect to Section 16(i). There it argued that Congress has enacted a statute of limitations and a tolling provision (Section 16(i)) and that this Court should not "do that which Congress has not yet chosen to do." (R.B. 20) If that is so, it follows a fortiorari that Mt. Hood itself should not be asking the Court to develop a broad equitable tolling concept to circumvent the statutory provisions Congress has enacted.

Finally, Mt. Hood's theory would make application of the statute of limitations an equitable issue in a vast number of cases—every time plaintiff's counsel could think of an explanation for not having filed sooner. That would create uncertainty as to the statute of limitations and increase the volume and scope of antitrust litigation to an even greater degree than would Mt. Hood's expansive interpretation of Section 16(i). All the policy reasons that militate against expanding Section 16(i) apply with even greater force to condemn adoption of "equitable tolling" in this case. (pp. 7-9 above)

The effect of tolling here would be to reward the stale claims of a party that deliberately and unjustifiably delayed bringing an action on its claims for nearly twice as long as the statute permits. It is not at all inequitable or unjust that Mt. Hood's claims be limited to the four-year period Congress has declared appropriate in antitrust cases. Congress has determined that trebling four years' worth of damages is more than enough incentive for private litigants to enforce the antitrust laws. The Court should not second-guess that judgment.

CONCLUSION

The judgment of the Court of Appeals should be reversed and the case remanded with instructions to eliminate any claim or award of damages for the period prior to July 5, 1964, and for further proceedings consistent with the decision.

Respectfully submitted,

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